86-1903

No. .....

Supreme Court, U.S.
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In The
Supreme Court of the United States
October Term 1986

BARBARA BAILEY HOWARD,

Petitioner,

v.

JOHN O. MARSH, JR.,
Secretary of the Army,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether, under the mandate of *U.S.P.S. Bd. of Governors v. Aikens,* 460 U.S. 711, petitioner, a former Department of the Army employee, had established a prima facie case for employment discrimination under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e et seq., by claiming disparate treatment because of her status as a white female EEO officer, when the respondent presented his full defense which should have reduced the job of the district court at bench trial to evaluation of whether the ultimate question of discrimination had occurred *vel non.*

2. Whether an erroneous understanding of the mandates of *McDonnell Douglas Corp. v. Green,* 411 U.S. 792 (1973), *Texas Department of Community Affairs v. Burdine,* 450 U.S. 248 (1981), and *Aikens,* caused the district court to focus on whether a "prima facie" case of discrimination had been established and to fail to reach the ultimtae question of whether discrimination had occurred *vel non.*

3. Whether the district court's findings of fact regarding petitioner's disparate treatment claim based on her Title VII § 704(a) protected activity as a white female EEO Officer at the time black males were threatening a Class Action were clearly erroneous under *Pullman-Standard v. Swint,* 456 U.S. 273, 285-90, 102 S.Ct. 1781, 1788-91, 72 L.Ed.2d 66 (1982), and can be reversed within the meaning of Fed.R.Civ.P. 52(a), when, as in *Aikens,* the district court was influenced by its mistaken view of the law by accepting restated argument from defendants rather than production of documented evidence or testimony, when

testimony by five major witnesses for defendants was impeached by petitioner either from documented evidence or prior inconsistent sworn testimony, making the defendants' proffered legitimate nondiscriminatory reasons for taking adverse actions against plaintiff unworthy of credence because they were effectively rebutted by petitioner under the *McDonnell Douglas-Burdine* standards.

4. Whether a federal plaintiff in a Title VII discriminatory retaliation suit against an employer for constructive discharge must plead and prove that the employer had the *specific intent* to force the employee to quit.

5. Whether a gross conflict in the United States circuit courts on the issue of whether such *specific intent* is necessary in a constructive discharge case must cause the grant of certiorari in order to establish a uniform national standard for Title VII civil rights litigation.

6. Whether a threat by a federally employed supervisor to a subordinate that "if she did not drop her EEO complaint, she would go nowhere in her federal career and may suffer further adverse actions," coupled with an agency pattern and practice of interference with training and employment opportunities for other positions which continued from the time of plaintiff's demotion, constitutes "illegal employment requirements" within the meaning of *Barrett v. Omaha National Bank,* 726 F.2d 424 (8th Cir. 1984), and would thus, upon the employee's resignation, amount to a constructive discharge.

CERTIFICATION AS TO INTERESTED PARTIES

The undersigned counsel certifies that there are no other interested parties other than those named in the caption of this case and their attorneys of record.

ROGER S. HANSON
Attorney for the Petitioner
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United States Supreme Court

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To the Honorable William H. Rehnquist, Chief Justice of the United States, and to the Honorable Associate Justices of the United States Supreme Court:

Petitioner, Barbara Bailey Howard, hereby prays for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit entered on December 23, 1986, entitled *Howard v. Marsh,* rehearing denied February 24, 1987, which affirmed the Memorandum Order of the United States District Court for the Eastern District of Missouri, the Honorable Edward L. Filippine, District Judge, entitled *Howard v. Marsh,* 616 F.Supp. 1116 (E.D.Mo. 1985).

OPINIONS BELOW

The United States District Court for the Eastern District of Missouri, the Honorable Edward L. Filippine, U.S. District Judge, issued its memorandum opinion entitled *Howard v. Marsh,* 616 F.Supp. 1116 (E.D.Mo. 1985) on July 11, 1985. A copy of that memorandum opinion is set forth in the appendix at page App. 1.

The United States Court of Appeals for the Eighth Circuit issued its order in this case on December 23, 1986, affirming the decision of the United States District Court for the Eastern District of Missouri. This order is set forth in the appendix at page App. 12.

A rehearing was denied on February 24, 1987. That order appears in the appendix at page App. 14.

JURISDICTION

Pursuant to the above dates, decisions and order, the United States Court of Appeals for the Eighth Circuit last acted on this case on February 24, 1987, when it denied rehearing. This Honorable Court has jurisdiction to review this case under 28 U.S.C. 2101(c) within 90 days of

February 24, 1987. Said 90-day period expires May 25, 1987.

—o—

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the U.S. Constitution provides in pertinent part:

> No person shall . . . be deprived of life, liberty, or property without due process of law.

Pertinent parts of Title VII of the Civil Rights Act of 1964, as amended, (42 U.S.C. 2000e-et seq.), include:

> Sec. 703. (a) It shall be an unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, condition, or privileges of employment, because of such individual's race, color * * * sex * * *; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, * * * sex, * * * or
>
> (3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section. * * *
>
> Sec. 704. (a) It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, * * * because he has opposed any practice made an unlawful employment practice by this title, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this title. * * *
>
> Sec. 717. [§ 2000e—16] Employment by Federal Government
>
> (a) Discriminatory practice prohibited; employees or applicants for employment subject to coverage.

All personnel actions affecting employees or applicants for employment * * * in military departments * * * having positions in the competitive service shall be made free from any discrimination based on race, color, * * * sex * * *

(b) * * *

The head of each such department, agency or unit shall comply with such rules, regulations, orders, and instructions which shall include * * *

(2) a description of the qualifications in terms of training and experience relating to equal employment opportunity for the principal and operating officials of each such department, agency or unit responsible for carrying out the equal employment opportunity program and of the allocation of personnel and resources proposed by such department, agency or unit to carry out its equal employment opportunity program * * *

———o———

STATEMENT OF THE CASE

1. Facts

Petitioner, a white female citizen of the United States, brought suit against her employer, the U.S. Army Troop Support and Aviation Materiel Readiness Command (TSARCOM) at St. Louis, in July 1981 under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e—et seq. and during the trial de novo in December 1983 which was continued to March 1984, totaling eleven days, 34 witnesses were heard and in excess of 90 exhibits were introduced.

Defendants are the Secretary of the Army; the former TSARCOM Chief of Staff, Booker T. McManus, colonel, U.S. Army; and other members of the TSARCOM command Group, which also included the Commanding General, and the Deputy Commanding General who served during petitioner's tenure.

In her formal administrative complaint filed in September 1980, petitioner contended that she was the subject of a pattern and practice of discrimination against her because she was a white female in the EEO Officer position during a time when concerned black males at the command were threatening to take Title VII Class Action. Essentially her claim was that the concerned black male (CBM) employees at TSARCOM had initiated a Class Action EEO complaint process on 28 September 1979. They alleged that the Commander; the head of the Civilian Personnel Office; his subordinate, the chief of Recruitment & Placement; the EEO officer, petitioner; and all directors were responsible for personnel actions which were discriminatory because of sex (male) and race (black) in which the CBM were denied training, promotions, and recruitment at TSARCOM.

Within two weeks of the inititation of the Class Action complaint process the Commander changed chiefs of staff. The incumbent, petitioner's supervisor for 10½ months of 1979, a white male, was replaced by a black male, Col. Booker T. McManus. The chief of staff is third in command after the deputy commander and the commander.

Through December 17 of 1979, plaintiff had only outstanding, satisfactory and exceptional evaluations on her performance at TSARCOM by four rating officials: deputy commanders and chiefs of staff, including McManus. At the end of December 1979, plaintiff selected a white female GS-11 EEO Specialist from a referral list sent to her from the Personnel Recruitment and Placement Branch. Petitioner had previously selected three EEO specialists in her operation, a Hispanic male GS-11, a black male GS-12 and a GS-12 male.

While petitioner was out of the state, the CBM learned of her GS-11 selection and complained to petitioner's

supervisor, McManus, that if the selection of the white female was not rescinded they would elevate their Class Action precomplaint to the formal stage. As the result of this action petitioner's supervisory authority to select her own staff was removed and action was taken to suppress the fact that petitioner had ever made the GS-11 selection. Petitioner contended that such interference with a valid selection is not only sexist and racist but it violates the Civil Service Reform Act. The fact that evidence of the selection was not available circumstantially confirms plaintiff's contention in this regard.

Within three months of this event, McManus, in March 1980, without prior notice, presented petitioner with her annual performance rating for January 1979 to January 1980. Petitioner was rated satisfactory; however, she was presented with a memorandum which rated her "marginal" in all substantive areas of her 1979 performance. Shortly thereafter, at the time she should have received a within-grade pay increase in April 1980, again without prior notice, petitioner was given notice that her pay increase was to be withheld if her performance did not improve within 60 days.

Petitioner informed McManus that she would process an EEO complaint if some understanding could not be reached on what she considered very unfair adverse actions against her. At this point there were three: removal of selection authority, an evaluation of marginally satisfactory performance for 1979 and denial of within-grade step increase.

Despite petitioner's unceasing efforts to reconcile differences with her supervisor over her performance requirements, after March 1980, what she calls a campaign by him to take actions to deny petitioner the authority and resources to fulfill her EEO officer job requirements was in

process. She maintains that actions were taken in an unlawful attempt to mollify the black males at the command from elevating their Class Action complaint.

Petitioner alleges that but for being a white female EEO officer at the time the CBM commenced a Class Action precomplaint that none of these adverse actions which ultimately culminated in her two-grade demotion from the EEO officer GS-13 position to a GS-11 Supply Cataloger position in February 1981 would have occurred. Petitioner was demoted to the Supply career field despite the fact that she had only served in that field at the GS-9 level some eight years before, and despite having up-to-date credentials for two GS-12 personnel career fields. Petitioner alleges that the two-grade demotion was an unnecessarily punishing action because she was qualified for a GS-12 position in *two* other career series.

In addition, petitioner alleges that Civilian Personnel Officer Wrigley and Chief of Recruitment and Placement Branch Gentry, who were similarly situated chiefs of personnel operations, as was petitioner, and named as alleged discriminating officials (ADOs,) as was petitioner, by the concerned black males, were not adversely affected in their careers, as petitioner in fact was. Despite reports of a number of Department of the Army investigating teams, which all cited serious deficiencies in the personnel operation, the personnel officer received a meritorious service award upon leaving the command in January of 1981. Petitioner claims this disparate treatment of similarly situated employees to be proof of EEO discrimination because she was a white female in the EEO Officer position at the time of the Class Action threat.

Petitioner amended her original complaint of sex discrimination to add "race." She took this action because not only were the two white male officials from the per-

sonnel staff receiving resources and authority to do their job, which were denied petitioner, but Julius Crouch (black), petitioner's subordinate GS-12 EEO Specialist, was receiving unlawful resources and authority. He was assuming responsibilities and authority that were properly vested only in an EEO officer. Through his interference a number of deficiencies in the EEO program were unfairly attributed to petitioner: two principal of which were the delay of the 1980 affirmative action plan prepared by petitioner and unreported filing of complaints which were improperly processed entirely by Crouch in a separate office. Despite petitioner's protests to McManus, Crouch, who was under the McManus supervision during the time, was able to continue this operation for almost a year.

The extensive evidence which can be adduced from the 11-day trial contains numerous exhibits and testimony showing that plaintiff's performance was superior to that of her two preceeding and succeeding EEO officers who happened to be black or male or both. The testimony came from various factions which are frequently at odds with one another: directors and supervisors; union officials; St. Louis community leaders representing blacks, women, American Indians and Hispanics, to name a few.

The court found, and the evidence shows, that petitioner performed under a time of "tensions and inflamed atmosphere" because of the Class Action. Petitioner contends that she was placed under higher performance standards than were her predecessors and successors and her resources were greatly reduced. Petitioner shows that her performance standards were raised and her resources were reduced by McManus.

Petitioner contends that McManus' adverse assessments of her performance were at all times tainted by his desire to confirm the allegations of the CBM that plain-

tiff was a discriminating official regarding black males at the command. The chief of staff's adverse actions could not have been taken against a black male EEO officer; it was only because of petitioner's gender and race that they were initiated. This desire on McManus' part to discredit plaintiff as the EEO officer was driven by a need to exculpate both himself and members of the Command Group (the former commanding general, the subsequent commanding general and the deputy commanding general) from any implication of impropriety regarding the CBM allegations of discrimination. These CBM allegations went back to the inception of the command in July 1977, some year and a half before petitioner's tenure began.

Therefore, as petitioner alleged, she met the *McDonnell Douglas* and *Burdine* standards for showing a prima facie case of discrimination under Title VII of the Civil Rights Act, §§ 703, 704(a) and 717. Petitioner was discriminated against because she opposed practices which were unlawful employment practices by this title, and because she made a charge in a complaint of discrimination which falls under this title. She was discriminated against because she consistently reported to the Command Group about the requirements under Title VII § 717 and implementing regulations for adequate resources and authority to carry out the TSARCOM EEO operation. Also, completely interrelated with these actions was the fact that she was discriminated against because of *unproved* allegations against her by the CBM. Plaintiff's processing a complaint of discrimination based on these events is a lawful reaction to unfair personnel actions.

After informing McManus of her intent to prosecute a complaint of discrimination, a series of so-called counseling memoranda were prepared by him from June through October 1980; however, they were only presented to plain-

tiff on 20 October 1980. Petitioner testified she was never informed at the time that these were counseling sessions and that they came about as the result of regular meetings with the chief of staff. Because they were presented long after the meetings, it was difficult or impossible for petitioner to adequately respond to McManus' allegations. Plaintiff specifically charged such actions were to substantiate the ultimate removal action and were in retaliation for her processing a complaint of discrimination.

Petitioner was permanently promoted to the GS-13 TSARCOM EEO Officer position in December 1978 from a temporary GS-13 EEO Officer position at a sister Army command, Rock Island, Illinois. Contrary to the district court's finding, she had held this position for *eight months* before arriving at TSARCOM. She successfully competed for the TSARCOM position in an *Army-wide* career referral system. Isabelle Klopner (black) had been the acting TSARCOM EEO Officer on a temporary GS-13 promotion from July 1978, and she unsuccessfully competed on the same referral with plaintiff. Klopner was plaintiff's GS-12 EEO Specialist subordinate. The EEO Officer prior to Klopner was Gilbert Cleckley (black). He served in the position from July 1977, which was the inception of the new command called TSARCOM, until July 1978. After plaintiff's removal from the EEO Officer position, Paul Bigby (black) served as action EEO Officer after petitioner's demotion until appointment of James Redwine (white) in May 1981.

Petitioner had a full trial on the merits. At the end of her case, the government moved to dismiss for failure to state a "prima facie" case. This motion was denied by the district judge. The government then put on a full defense directed toward proffering legitimate nondiscriminatory reasons for the adverse actions taken against peti-

tioner which culminated in her two-grade demotion from her GS-13 EEO Officer position. The government also defended allegations of petitioner's constructive discharge because of a pattern and practice of retaliation which denied her training and opportunities for promotion.

At the end of the government's presentation, it moved this time for a "directed verdict" in its favor. This was also denied by the district court, placing before the judge the sole ultimate issue in this case: whether discrimination had occurred *vel non.* See *U.S.P.S. Bd. of Governors v. Aikens*, 460 U.S. 711, 714-716.

However, in the opinion, the district court ruled that plaintiff, petitioner herein, had not established a "prima facie" case of discrimination under Title VII, and thus never properly got to, considered or understood the two competing factions which, at that time, had already established a prima facie case on the part of plaintiff, and which, at that time, had engendered an effort to present legitimate nondiscriminatory reasons for the adverse actions and alleged retaliation taken against petitioner.

Furthermore, in resolving petitioner's contention that she had been constructively discharged from the federal position to which she had been demoted, and after her filing of another EEO complaint when she quit her job because of a pattern and practice of interference with training and promotional opportunities, which substantiated a supervisorial threat that unless she dropped the EEO complaint, she would never be promoted and she would suffer further adverse consequences, the district court ruled that petitioner had failed a show a *specific intent to cause her to quit* under the Eighth Circuit rule of *Johnson v. Bunny Bread Co.,* 646 F.2d 1250 (8th Cir. 1981). The district court acknowledged that other circuits did not require the showing of specific intent to cause an employee to quit,

thus demonstrating a gross conflict in the twelve circuit courts on this federal issue. The 4th, 8th & 10th circuits require the plaintiff to show specific intent to prove a constructive discharge; all nine (9) other circuits, including district courts in the circuits not yet specifically ruling on the intent issue, do not require such proof of specific intent for a constructive discharge.

Petitioner thus presents two major national issues in this petition for certiorari, with the issue of whether proof of a specific intent to cause the employee to quit in a Title VII constructive discharge case being an issue of first impression with clear conflict in the U.S. circuit courts.

ARGUMENT

1. **THE DISTRICT COURT IN ITS MEMORANDUM OPINION FOCUSED ITS RULING ON THE ISSUE OF WHETHER PETITIONER HAD ESTABLISHED A "PRIMA FACIE" CASE OF DISCRIMINATION AFTER A FULL TRIAL ON THE MERITS HAD OCCURRED AND AFTER THE COURT HAD FIRST DENIED A MOTION TO DISMISS FOR FAILURE TO PROVE A "PRIMA FACIE" CASE AT THE CONCLUSION OF THE PLAINTIFF'S CASE AND LATER HAD DENIED A MOTION FOR ENTRY OF JUDGMENT FOR THE DEFENDANTS AFTER CLOSE OF ALL EVIDENCE, THUS FAILING TO PROPERLY RESOLVE THE ULTIMATE ISSUE OF WHETHER DISCRIMINATION HAD OCCURRED VEL NON. THIS CLEARLY ERRONEOUS UNDERSTANDING AND RULING BY THE DISTRICT COURT VIOLATED THE REASONING AND MANDATES OF McDONNELL DOUGLAS CORP. V. GREEN, 411 U.S. 792 (1973); TEXAS DEPARTMENT OF COMMUNITY AFFAIRS V. BURDINE, 450 U.S. 248 (1981), AND U.S.P.S. BD. OF GOVERNORS V. AIKENS, 460 U.S. 711 (1983).**

A. In its bench opinion of July 11, 1985, at paragraph II, the district court generally and correctly sets forth the well-established burdens in a Title VII case: the plaintiff carries the burden of establishing a prima facie case; if that is done the defendant must articulate some legitimate nondiscriminatory reasons for adverse employment action; only if the defendant meets this burden, does the burden re-shift to the plaintiff to demonstrate defendant's "reasons" were but a pretext to discriminate.

Manifestly, the case at bar went to full trial on the merits and at the end of the plaintiff's case the defense unsuccessfully moved to dismiss for failure to establish a "prima facie" case, and at the end of the defense case the United States attorney moved for a "directed verdict." The motion was denied by the district court. After the full trial, it appears that the issue of "prima facie" case being established *vel non* is moot and no longer a consideration in the case; yet in its memorandum opinion, the district court focused on the issue of whether a "prima facie" case had been established or not, and, in concluding that it had not, never thereafter properly gave attention to the ultimate issue in the case: whether discrimination occurred *vel non*.[1] Indeed, this very judge had previously during

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1. From Volume 6, 6-247, line 2:

MR. WEDEMEYER [the U.S. attorney]: Just may I make one other—bring up one other matter. I would like to make a motion for the defense for a directed verdict at this time. I understand from all of your conversations about briefing that you may not be inclined to do it, and I'm not going to argue at any length, I'm just going to state that I think the evidence here is monumental, number one, that the Army took the proper course of action, that they were justified in doing so, and like I said, at the end of the last two week period, there's really not a shred of evidence of any discrimination in this case; to the contrary, that Col. McManus was the most fair and impartial supervisor at DARCOM (sic).

THE COURT: The motion will be denied.

the trial denied a motion to dismiss for failure to establish a "prima facie" case!

This erroneous thinking, analysis and ruling violate the panoply of decisions of this Honorable Court commencing with *McDonnell-Burdine,* and extending through *Aikens.* Because the instant case was fully tried on its merits, it is erroneous to find the district court addressing the issue whether plaintiff-petitioner made out a "prima facie" case; by basing his ruling on this question, it failed to properly and fully reach the only necessary and ultimate issue in the case: whether discrimination occurred *vel non. U.S.P.S. v. Aikens,* supra, at 713-714.

As this court held, in Aikens, speaking through now Chief Justice Rehnquist, 460 U.S. at 714-715:

> But when the defendent fails to persuade the district court to dismiss the action for lack of a prima facie case, and responds to the plaintiff's proof by offering evidence of the reason for the plaintiff's rejection, the factfinder must then decide whether the rejection was discriminatory within the meaning of Title VII. At this stage, the McDonnell-Burdine presumption "drops from the case," 450 U.S., at 255, n. 10, and "The factual inquiry proceeds to a new level of specificity."

The Chief Justice notes at page 715 that after a full defense has been presented, "The District Court was then in a position to decide the ultimate factual issue in the case."

That "factual issue" is "whether the defendant intentionally discriminated against the plaintiff." *Burdine,* 450 U.S. at 253. Importantly, the Chief Justice continues at page 715 with:

> Where the defendant has done everything that would be required of him if the plaintiff had properly made out a prima facie case, whether the plaintiff

> really did so is no longer relevant. The district court has before it all the evidence it needs to decide whether "the defendant intentionally discriminated against the plaintiff." *Burdine,* supra, at 253.

Of critical concern in this case is whether the learned district judge, missing completely the fact that a prima facie case had already conclusively been established, and instead focusing upon that issue and ultimately and erroneous ruling that it *had not,* exhibits any further competence on the ultimate issue, for it would appear that he must inferentually find *no need* to thoroughly weigh the pros and cons of the ultimate issue: whether discrimination exists *vel non.*

B. The ruling of the district court was clearly erroneous as can be demonstrated by unchallenged, non-conflicting exhibits introduced at trial, Rule 52, F.R.Civ.Proc. The respondents' proffered evidence was unworthy of credence, and there was not demonstrated a legitimate, non-discriminatory reason for removal of petitioner as the TSARCOM GS-13 EEO Officer, with a two-level downgrade to GS-11.

In summary, this Petition for Certiorari seeks to show by definite, uncontested exhibits set forth in the appendix and referenced in the body of the petition that the district court was clearly erroneous in failing to find that plaintiff had proved a prima facie case of federal employment discrimination; that the district court was clearly erroneous in finding that the respondent had articulated legitimate non-discriminatory reasons for removal of petitioner from her GS-13 Equal Employment Opportunity Officer position with the subsequent demotion to GS-11 Supply cataloger; and that the district court was clearly erroneous in failing to find that plaintiff had been constructively discharged

from her federal position because of intolerable working conditions.

Plaintiff-petitioner liberally sets forth exhibits in the appendix of this petition and thus asserts that there is no need to resort to any disputed oral testimony adduced at trial other than that used to impeach defendants' witnesses from exhibits or prior inconsistent sworn testimony in order to show that the district court was clearly erroneous. Certiorari should therefore be granted to establish clear guidelines for the management of Title VII lawsuits where, as here, the trial has proceeded to conclusion on the merits.

II. THE FINDINGS BY THE DISTRICT COURT ARE CLEARLY ERRONEOUS WITHIN THE MEANING OF PULLMAN-STANDARD V. SWINT, 456 U.S. 273 AND F.R.CIV.P. 52(A) AS CAN BE DEMONSTRATED BY UNCHALLENGED EVIDENCE AT THE BENCH TRIAL; WHERE THE DISTRICT COURT AS A MATTER OF LAW CLEARLY FAILS TO UNDERSTAND THE PROOF OF A PRIMA FACIE CASE, THE RECORD AT TRIAL CAN BE RESORTED TO TO DEMONSTRATE THAT THE FINDINGS ARE CLEARLY ERRONEOUS.

While petitioner cannot, obviously, in the limited space available in a Petition for Certiorari, conclusively demonstrate clearly erroneous rulings, following an eleven-day trial, in the findings by a district court, petitioner will highlight the evidence adduced at trial to convince this Honorable Court that production of the entire record in a single appendix when certiorari is granted would convincingly show such clear error in the memorandum opinion. Selected trial exhibits and selected trial testimony are offered in Appendix B and C respectively. We herein address certain key issues noted by the District Court in its memorandum opinion of July 11, 1985 (616 F.Supp. 1116).

A. The uncontradicted excellent record of petitioner in her federal career; the ratings by Colonel Goodall and Colonel McManus to March 1980.

In Appendix B we have set forth a document by Colonel Goodall which was hand-written in its original form on 28 February 1980. It is noted that Goodall praises petitioner for doing an outstanding job, working many hours of overtime, in developing the EEO program for the TSARCOM, the Affirmative Action program, the EEO Counselor program, all the while working in an office short of staff (Document App. 15).

Colonel Booker T. McManus, Goodall's successor, rated petitioner at the highest possible rating, level 4, as "exceptional" in all categories, in his evaluation for a GS-13 position with the Merit Systems Protection Board vancy on December 17, 1979 (Document App. 16).

In March 1980, McManus and Deputy Commander Hesson rated petitioner as satisfactory and stated, "Ms. B. Bailey Howard can be depended upon to be fair and objective in dealing with members of her staff and/or a member of the Command. She is supportive of minorities and women." (Document App. 17).

In May 1979, petitioner was rated outstanding by Colonel Goodall and Deputy Commanding General Aaron Lilly (Document App. 20). On 26 September 1979, petitioner received the highest rating provided, with one exception; she received "above average" ratings on her supervisory abilities and other key areas (Document App. 22). Thus it is clear that there were no adverse evaluations of petitioner throughout the 1979 performance year. The ratings were made by at least five (5) different evaluating officials from the TSARCOM Command Group.

Petitioner was faced with a dearth of EEO supporting personnel, three EEO professionals leaving for promo-

tional opportunities elsewhere in the government during a six-week period during the summer of 1979. Document App. 27 specifically illustrates the official complement of the EEO operation before and after petitioner's tenure as EEO officer from December 1978 to February 1981, with the rather dramatic increase of the EEO Office staff doubling after she left and a successor (Redwine) became EEO Officer in May 1981.

A primary functional problem for petitioner in operating the TSARCOM EEO Office commenced with the December 1979 removal of her selection authority which disenabled the filling of necessary EEO specialist positions (Document App. 29). This dearth of professional support dogged petitioner's entire tenure as the TSARCOM EEO Officer. It was never disputed at trial.

R. J. Kaiser, president of the National Federation of Federal Employees local at TSARCOM, gave petitioner accolades in her position as EEO Officer at TSARCOM on March 12, 1981 (Document App. 30). Note that he stresses her beneficial efforts in successfully negotiating the union's acceptance of the affirmative action plan, the plan being an area where petitioner was adjudged deficient and is discussed in more detail infra. In addition, petitioner has copious similar documents and trial testimony from leaders of all relevant minority groups, a director, and a commander from Fort Leonard Wood, many of whom supported her for advancement to higher positions at the GS-13 level. Select letters are presented (Document App. 31).

Significantly, on 24 January 1980, Major General Richard Thompson, Commanding General of TSARCOM, and Colonel McManus jointly executed a "Certificate of Appreciation" to petitioner for "excellent performance" in activity related to her EEO Officer position (Document App. 38).

B. The findings of the district court are clearly erroneous that petitioner delayed selection of GS-12 EEO Specialist (Federal Women's Program Manager) position.

The court finds at line 6 ff, page 10, of its Memorandum Opinion:

> Indeed she could not even accomplish the crucial task of filling vacant positions in her office. In the fall of 1979 plaintiff was faced with numerous EEO complaints that needed attention and the lack of some full time staff to fill positions which were authorized. When plaintiff received a list of people to choose for the position, she returned the list because in her opinion only two of the three names listed were qualified and she was concerned about the selection process. Following this incident Colonel McManus was forced to exercise her selection authority for her.

This clearly erroneous finding is refuted by the series of documents labeled App. 39 through App. 43:

Document App. 39, dated August 23, 1979, lists candidates Bigby, Jones, Sheffield, and Green on the "Career Referral List." The annotation beside Green reflect that she is not available for selection. Petitioner at the bottom of Document App. 40 indicates she selected James Sheffield on November 29, 1979. Document App. 41 illustrates that on September 27, 1979, petitioner reviewed the documentation accompanying each of the three available candidates for the GS-12 position and concluded that only *one* had prior experience with the Federal Women's Program.

Importantly, petitioner did not, ever, state that "only *two* of the three names listed were *qualified.*" Here the difference between *qualified* and *suitable* is of significant import. Document App. 42 illustrates that E. J. Wrigley, Civilian Personnel Officer, returned the referral to the Department of the Army at the request of the DARCOM acting chief, Office of Equal Opportunity, George Jones, in an effort to develop additional candidates with specific

Federal Women's Program Manager experience. Apparently none were available as the referral list was returned and the selection date was extended to 28 December 1979. Petitioner moved with alacrity and selected Sheffield on November 29, 1979 (Document App. 43).

The inescapable conclusion is that petitioner operated to fill the vacancy fully within accepted procedures, and made her selection upon receipt of the referral from the personnel directorate in a timely manner. It was not petitioner who managed the referral by sending it to DARCOM, Department of the Army and back, it was the personnel directorate, DARCOM and the Department of the Army.

It is important to note that Sheffield declined the position on *December 31, 1979*, "due to problems with his mother" (Document App. 40). Document App. 43 reflects that McManus, after taking over petitioner's supervisory selection authority, was given until 5 March 1980 to select; he failed to timely make a GS-12 selection by delaying until 21 March 1980. His selection action was late by 16 days. Thus the court accepted defendants' argument without production in ruling that petitioner, rather that McManus, was tardy in making selections and this was legitimate nondiscriminatory reason to remove petitioner's selection authority.

C. Removal of petitioner's personnel selection authority was purely pretextual and not a legitimate nondiscriminatory reason.

In Document App. 29, dated 21 December 1979, "SUBJECT: Personnel Selection Authority," McManus states in paragraphs 3 and 4:

> 3. Inherent in the personnel management responsibilities of a supervisor is the *authority* to make selections in filling positions. However, effective this date, and until further notice, the selection authority

> for position in the Equal Employment Opportunity Office, Headquarters, TSARCOM, will be retained by the undersigned.
>
> 4. This *action is not intended to reflect on your competence in the selection process,* but rather, is deemed necessary due to the *extreme sensitivity* of the Command's Equal Employment Opportunity Program posture. Staffing of the Equal Employment Office *during the present critical period* will have a direct impact on the future advancement of the EEO Program, and work process perceptions of the Command's interest in Program advancement. [Emphasis added.]

This document supports petitioner's position as alleged throughout her complaint process regarding *authority* and resources for her to do her job; removal of selection authority is a serious action and one which is taken only upon cause. McManus' letter asserts that the action is not intended to reflect on petitioner's competence in the selection process; therefore, this statement in itself proves McManus had no cause for such an adverse action against petitioner. Only much later, in an after-the-fact effort to justify his denial of within-grade increase and removal of petitioner from the EEO Officer position does McManus assert that he had to remove petitioner's authority because she was untimely in selecting for the GS-12 Federal Women's Program Manager's position.

McManus' reason for removal of petitioner's selection authority for failure to timely select the FWPM is clearly pretextual because as already discussed in this Petition for Certiorari, Mr. Sheffield did not decline his selection until *December 31, 1979* (Document App. 40). This declination was *ten (10) days after* McManus' action to remove petitioner's selection authority.

Final evidence in this regard comes from testimony of the government's own witness, C. Patrick Gentry; the chief of Recruitment and Placement Branch testified at

trial that petitioner was not out of the normal with other selecting officials in relation to the average time to fill positions. He stated that she complied with "procedure, per concerns of the Uniform Guidelines and Employee Selection Procedure." See Document App. 57 for testimony at Trial Transcript Vol. 3, page 3-45, lines 19 through 25, and page 3-46, lines 1 through 6.

Therefore, the District Court decision in favor of defendants in this regard must be clearly erroneous.

D. The clearly erroneous finding at page 10, paragraph 2 of the Memorandum Order that petitioner did not timely process discrimination complaints.

The district court stated:

> In addition, plaintiff was authorized 35 EEO Counselors to assist her. EEO Counselor are employees who devote part of their time to handling charges of discrimination informally before a formal complaint is filed. Once a formal complaint is filed the TSARCOM EEO office is to gather the necessary documentation, including the report of the EEO Counselors, and forward the complaint to DARCOM's EEO office within three days of the complaint being filed. TSARCOM does not conduct the investigation into the charges in a formal complaint; that task is assigned to the United States Army Civilian Appellate Review Agency. Plaintiff was assigned numerous people on short and long term details to assist her in timely forwarding formal complaints of discrimination to DARCOM. *Plaintiff, although having the necessary resources, failed to both properly prepare and timely forward formal complaints to DARCOM. Plaintiff's failure in this regard resulted in disruptions to the EEO process and prompted much criticism from DARCOM.* [Emphasis added.]

Petitioner asserted that she was not provided anywhere close to sufficient minimal staff to fulfill the functions of the TSARCOM EEO Officer position. Indeed, as shown in Document App. 27, but five (5) "authorized

spaces" were extant on 15 September 1978 through 30 June 1980. This was elevated on 16 March 1981 to seven (7) and on 27 May 1981 to eight (8). Petitioner, however was removed as TSARCOM EEO Officer on 8 February 1981.

On 25 November 1981, the "Authorized Spaces" had almost tripled, or at least had doubled, to 14!

Indeed, on June 9, 1980, petitioner advised the chief of staff, McManus, of the EEO staff available as compared to the staff which should have been available to her as EEO Officer. Document App. 45 reflects that petitioner had only a staff of three clerical support persons to assist her. She should have had a staff of eight (8), with five (5) EEO-experienced workers. She labored under an unheard of EEO workload with only one EEO professional —herself.

At the trial, on direct and cross examinations, the DARCOM director of EEO from Alexandria, Virginia, George Jones, a defense witness, admitted that under the best of circumstances, faced with the EEO office workload and available staff, petitioner could have accomplished but 65 to 70 percent of the task. See Appendix App. 58 for Jones' testimony.

In a like manner, Jones, the DARCOM Director of EEO, testified that he believed Crouch, not petitioner, was responsible for sending the formal complaints to USACARA. He could only "assume" that petitioner Ms. Howard could be derivately responsible when he wrote his letter because of her EEO Officer status, as the EEO Officer is the person authorized and responsible for this function. See Appendix App. 60, trial testimony 4-122 to 4-123.

In addition, petitioner, of course, a 20-year career experienced GS-13 federal employee, testified to the im-

possibility of carrying out the TSARCOM EEO Officer's requirements with the decimated staff available, and with a mere skeletal staff after three full-time EEO professionals had left for promotional opportunities at other federal agencies during the summer of 1979.

Hence the district court is *clearly erroneous* at page 10 and 11 in the above-cited opinion.

E. The clearly erroneous finding at page 11, district court Memorandum Opinion, that petitioner was "unable to timely and properly prepare an affirmative action report."

Nothing can be more clearly erroneous than this finding; petitioner immediately faced a backlog of incompleted program management tasks upon her December 1978 entrance to TSARCOM. This was a legacy from her predecessors. Exemplary of it was a *thrice rejected* EEO affirmative action plan prepared by petitioner's predecessor. That plan had failed to gain the commander's approval on 10 October 1978, on 20 November 1978, and again on 1 December 1978. When petitioner took over as EEO Officer, this plan was revised according to Civil Service Commission requirements, submitted to the commander on 27 February 1979 and approved upon his first submission on 6 March 1979 (Document App. 49). Petitioner was assigned to TSARCOM on 3 December 1978 and arrived on the 6th.

Secondly, it is evident that petitioner assumed responsibility for the 1980 affirmative action plan and timely submitted the plan as admitted by the DARCOM EEO director, George Jones, at the trial. See Volume 4, Defense Witness, page 77, reproduced at Appendix App. 62; see also Vol. 4, page 80, lines 11-19, reproduced at App. 62, wherein extensions were granted to both the Department of the Army and DARCOM and these extensions were made applicable to petitioner at TSARCOM.

Therefore, by sworn trial testimony of an adverse defense witness who was the person responsible for the plan requirements, petitioner did not file a late 1980 affirmative action plan, and the district judge is shown to be clearly erroneous at page 11 of the Memorandum Opinion, (616 F.Supp. 1116) set forth in Appendix A.

Finally, in this regard, is the punishing two-grade demotion the petitioner suffered despite the fact that she was qualified in two personnel career series at the GS-12 level as evidenced by a "notification of Application Action" (Document App. 55). This notification states that petitioner is qualified at the GS-12 level for Supply Cataloger, GS-2050-12, for Personnel Staffing Specialist GS-212-11 & 12, and Management Employee Relations Specialist GS-230-11 & 12. Yet she was demoted to a GS-11 Supply Cataloger, a career series from which she was promoted from a GS-9 to EEO some *eight (8) years before!*

It must follow that the above three broad attacks on the opinion supports petitioner's arguments that the district court's conclusion is clearly erroneous when it held petitioner failed to prove a "prima facie" case and thus there was no showing of discrimination.

Should certiorari be granted in this case the complete single appendix will demonstrate beyond question the clearly erroneous rulings. Again we must note that space limitations force but the highlights to the citations.

III. PETITIONER HOWARD WAS CONSTRUCTIVELY DISCHARGED FROM HER FEDERAL POSITION BECAUSE SHE RESIGNED AS A RESULT OF WORKING CONDITIONS "SO DIFFICULT OR UNPLEASANT THAT A REASONABLE PERSON IN HER SHOES WOULD HAVE FELT COMPELLED TO RESIGN," BROUGHT ABOUT WHEN SHE WAS TOLD BY HER SUPERVISOR IN HER NEW SUPPLY

POSITION TO WHICH SHE WAS DEMOTED "THAT SHE WOULD GO NOWHERE IN HER FEDERAL CAREER AND MAY SUFFER FURTHER ADVERSE ACTION IF SHE DID NOT DROP HER EEO COMPLAINTS," THE LATTER BEING A CLEAR FEDERAL RIGHT SHE POSSESSED; SHE NEED NOT SHOW SPECIFIC INTENT ON THE PART OF THE EMPLOYER TO FORCE HER RESIGNATION; DUE TO A GROSS CONFLICT IN THE FEDERAL CIRCUITS WHETHER INTENT MUST BE SHOWN IN THE CRITERIA FOR A CONSTRUCTIVE DISCHARGE, AND A MAJOR NATIONAL ISSUE BEING PRESENTED, CERTIORARI TO THE U.S. EIGHTH CIRCUIT SHOULD BE GRANTED.

Petitioner presents for resolution by this Honorable Court the nationally significant issue whether a showing of specific *intent* to force an employee to quit is necessary to establish a Title VII *constructive discharge.*

There is a gross conflict in the circuits. The United States Court of Appeals for the Eighth Circuit in *Johnson v. Bunny Bread Co.,* 646 F.2d 1250 (8th Cir. 1981) held that "to constitute a constructive discharge, the employer's actions must have been taken with the intention of forcing the employee to quit." The Eighth Circuit's criteria, of course, governs the current state of the decision in petitioner's case.

The district court decision, undisturbed by the brief panel decision of December 23, 1986, recognized "non clarity" in the Eighth Circuit by citing a different panel decision, *Barrett v. Omaha National Bank,* 726 F.2d 424 (8th Cir. 1984), stating that *intent* was not included in another definition of constructive discharge; *Barrett* defined it as occurring "when the employee involuntarily resigns to escape intolerable and *illegal employment requirements* [emphasis added]."

However, the district court concluded that petitioner had not shown a constructive discharge under *either* of the allegedly different Eighth Circuit criteria. In accord with the Eighth Circuit requiring a demonstration of specific intent to force the employee to quit are the 4th and 10th circuits: *EEOC v. Federal Reserve Bank,* 698 F.2d 633 (4th Cir. 1982); *Muller v. United States Steel Corporation,* 509 F.2d 923, 929 (10th Cir. 1975).

It is plain that the other federal circuits do not require the employee to demonstrate that the employer had the specific intent to force him to quit. *Alicea Rosada v. Garcia Santiago,* 562 F.2d 114, 119 (1st Cir. 1977); *Orshan v. Macchiarola,* 570 F.Supp. 620, 625 (E.D.N.Y. 1983) (a 2d Circuit district court); *E.E.O.C. v. Hay Associates,* 545 F.Supp. 1084, 1085-1087 (E.D.Pa. 1982) (a 3d Circuit district court); *Borque v. Powell Electric Mfg.,* 617 F.2d 61, 65 (5th Cir. 1980); *Welch v. University of Texas,* 659 F.2d 531, 533 (5th Cir. 1981); *Held v. Gulf Oil Company,* 684 F.2d 427, 432 (6th Cir. 1982); *Geisler v. Folsom,* 735 F.2d 991, 996 (6th Cir. 1984); *Bailey v. Binyon,* 583 F. Supp. 923, 928 (N.D. Ill. 1984) (a 7th Circuit district court); *Heagney v. University of Washington,* 642 F.2d 1157, 1166 (9th Cir. 1981); *Nolan v. Cleland,* 686 F.2d 806, 812-814 (9th Cir. 1982); *Lojek v. Thomas,* 716 F.2d 675, 681 (9th Cir. 1983); *Satterwhite v. Smith,* 744 F.2d 1380 (9th Cir. 1984); *Henson v. City of Dundee,* 682 F.2d 897, 907 (11th Cir. 1982); *Clark v. Marsh,* 665 F.2d 1168, 1173 (D.C. Cir. 1981).

The leading treatise by Schlei and Grossman, *Employment Discrimination Law,* 611-617, and its 1983-1984 Cumulative Supplement, 127-128, charts the above continuing great chasm in the circuits.

Petitioner presents the opportunity and necessity for a grant of certiorari to resolve whether a showing of

specific intent to force an employee to quit must be pleaded and ultimately demonstrated by an employee litigant in an EEO-Title VII suit alleging constructive discharge from employment.

Petitioner contends that she faced working conditions "so difficult or unpleasant that a reasonable person in her shoes would have felt compelled to resign," per the criteria of such non-intent Federal authorities as *Geisler v. Folsom,* 735 F.2d 991, 996 (6th Cir. 1984) and *Borque v. Powell Electric Mfg.,* 617 F.2d 61, 65 (5th Cir. 1980).

This was predicated on the undisputed fact that petitioner's supervisor in her new position told her that if she admitted she was wrong, dropped the complaints and concentrated on her Supply career that she could have a future. Otherwise he indicated that petitioner could be hindered in career progress, and would suffer further adverse consequences. Indeed, the prescription for "freedom from reprisal" for complaints to be free from "restraint, interference, coercion, discrimination or reprisal" is breached by this so-called "counseling" session under 29 C.F.R. § 1613.261. It is an "illegal employment requirement," as that term is used in the sister panel decision of *Barrett v. Omaha National Bank,* 726 F.2d 424, 428 (8th Cir. 1984), and thus under either standard of the U.S. Eighth Circuit, petitioner has clearly demonstrated that she was forced into resigning her position as a Supply Cataloger GS-11, thus being constructively discharged.

Despite defendant's counsel stating in opening statement that this contention by petitioner would be rebutted, petitioner's evidence at trial went unchallenged, and must be taken as true for purposes of resolution of the issue of specific intent necessity.

Geisler v. Folsom, 735 F.2d 991, 996 (6th Cir. 1984) presented an analogous threat of pessimistic future promotional opportunity. In *Geisler* appellant contended that she resigned because her supervisor told her that she had no future in the Department. At trial, her supervisor flatly denied the allegation and testified that "he had not had an opportunity to evaluate plaintiff at the time of her resignation which came one month after he took over as Director." In dire contrast, in petitioner's case, her sworn trial testimony was fully uncontradicted and in the opinion the district court found that this comment by the supervisor "has no place in the workplace." Ipso facto, such a comment created a demonstrably barren future to receipient, and created an aura of impossibility to rise above the demoted position unless she gave up her clear right to pursue her EEO suit. Such forced relinquishment of a clear federal right to even remain in a position and pessimistically work for advancement does indeed create working conditions "so difficult or unpleasant a reasonable person in petitioner's shoes would have felt compelled to resign."

Contrary to the court's opinion, under which it considered the holding in *Barrett v. Omaha National Bank,* 726 F.2d 424, 428 (8th Cir. 1984), plaintiff did show that she was constructively discharged when she involuntarily resigned to escape intolerable and illegal employment discrimination. Pertinent caselaw has held that an otherwise voluntary resignation may be deemed involuntary for Title VII purposes where the employee is driven to the resignation by a pattern and practice of discrimination and retaliation. See *Clark v. Marsh,* 665 F.2d 1168, 1174 (D.C. Cir. 1981); *Taylor v. Jones,* 653 F.2d 1193, 1199 (8th Cir. 1981).

Therefore the plaintiff in a suit seeking relief from an alleged constructive discharge should not need to show a purpose or intent to compel resignation but need only show aggravating circumstances. It is thus evident that the time is ripe for this Honorable Court to grant certiorari to resolve this significant national bifurcation in Title VII constructive discharge criteria. Petitioner asserts that she need show no specific employer intent and that the supervisorial threat coupled with other subsequent and precedent overt behavior on the part of her employer firmly established constructive discharge.

Certiorari should therefore be granted to resolve the conflict in the circuits and to establish uniform national law.

CONCLUSION

A nationwide issue of first impression for ruling by this Court is presented in the question whether a constructively discharged federal employee must allege and prove that the employer had the specific intent to cause the employee to quit. The U.S. courts of appeal for the 4th, 8th and 10th circuits so require, while the other nine circuits do not.

The clear conflict in the circuits on this question should require the grant of certiorari to the United States Court of Appeals for the 8th Circuit.

The question of whether a district court after a full trial on the merits should focus upon and decide whether a "prima facie" case has been established by the plaintiff in a Title VII employment discrimination case has been addressed by *U.S.P.S. Bd. of Governors v. Aikens,* 460 U.S. 711, and has been answered in the negative. Petitioner's district court wrongly focused upon such a ques-

tion, wrongly ruling that a "prima facie" case had not been established after hearing a full trial on the merits and twice denying government motions to dismiss on this issue. Since the district court failed to *properly* consider the ultimate issue in the case, whether discrimination had occurred *vel non*, certiorari should be granted to further define and clarify the procedures governing Title VII litigation.

DATED: May 26, 1987

ROGER S. HANSON
Attorney for Petitioner
Member of the Bar
United States Supreme Court

APPENDIX A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

BARBARA BAILEY HOWARD,

Plaintiff,

v. No. 81-654 C (2)

JOHN O. MARSH, JR.,
Secretary of the Army,

Defendant.

MEMORANDUM

(Filed July 11, 1985)

This matter is before the Court for a decision on the merits following trial to the Court. Plaintiff Barbara Bailey Howard alleges that she was discriminated against in the terms and conditions of her employment because she is a woman, is white, and filed a complaint of illegal discrimination. In addition, plaintiff maintains that she was constructively discharged from her employment as a result of intolerable working conditions. The defendant in this action is John O. Marsh, Jr., Secretary of the Army. Plaintiff rests defendant's liability on the provisions of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-16, *et seq.*, and this Court has jurisdiction to hear plaintiff's complaint against defendant. After careful consideration of all the evidence adduced at trial the Court concludes that plaintiff was not the victim of unlawful discrimination and adopts this memorandum as its Find-

ings of Fact and Conclusions of Law pursuant to Fed.R. Civ.P. 52.

I

In October of 1978 plaintiff was selected as the Equal Employment Opportunity ("EEO") Officer for the Troop Support and Aviation Material Readiness Command ("TSARCOM") located in St. Louis, Missouri. TSARCOM is a component of and a subordinate command to the Department of the Army Material Readiness Command ("DARCOM"). TSARCOM employs approximately 4,500 civilian personnel. The mission of TSARCOM is to procure aviation and troop support material and supplies for the United States Army. TSARCOM's EEO office provides services not only for TSARCOM civilian employees, but also for around 500 civilians at other Department of Defense commands and activities located in and around St. Louis.

Plaintiff served as EEO Officer at TSARCOM from December 3, 1978, to February 8, 1981, when plaintiff was removed from that position and downgraded to the position of Supply Cataloger. Plaintiff as an EEO Officer was rated as GS-160-13 (Step 2), and was a GS-2050-11 (Step 10) when she was demoted to the position of supply cataloger. Plaintiff resigned from government service on July 19, 1982, maintaining that the conditions of her employment were such that she was forced to resign.

Plaintiff has been a civilian employee of the United States government since 1961, in a variety of capacities including a Supply Cataloger. Since 1970 plaintiff has been involved with Equal Employment Opportunity. Plaintiff was employed as an EEO specialist at the Armament Com-

mand in Rock Island, Illinois, prior to being named EEO Officer at TSARCOM. Although plaintiff had some managerial experience prior to her employment at TSARCOM, her prior managerial responsibilities were not as extensive as those entrusted to her at TSARCOM.

When plaintiff assumed her responsibilities as an EEO Officer in December of 1978, her immediate superior was Colonel Arthur Goodall, a white male, and the TSARCOM Chief of Staff. Colonel Booker T. McManus, a black male, succeeded Colonel Goodall as Chief of Staff and plaintiff's supervisor. Plaintiff alleges that Colonel McManus discriminated against her. In fact plaintiff maintains that the entire Command Group, of which McManus was a member, was guilty of illegal discrimination. At the time of plaintiff's selection, and until July, 1980, the Commander of TSARCOM was Major General Richard H. Thompson, a white male. Following Thompson as Commander of TSARCOM was Major General Emil L. Konopnicki, a white male. The Deputy Commander of TSARCOM from November of 1979 to June, 1982, was Brigadier General James L. Hesson, a white male. (Hesson was promoted from colonel to general during this period.)

Plaintiff's annual salary at the time of her appointment in December of 1978, as a GS-13 (Step 1) EEO Officer, was $27,453. In April of 1979 plaintiff received a step increase (to Step 2) for satisfactory performance. At the outset of plaintiff's sojourn as an EEO Officer she received high marks. This, however, soon changed. On March 21, 1980, Colonel McManus, the TSARCOM Chief of Staff and plaintiff's immediate supervisor, gave plaintiff an annual performance appraisal of "satisfactory" for

the period January 1, 1979, to January 1, 1980. This was the first annual performance appraisal of plaintiff as TSARCOM's EEO Officer. On the same date Colonel McManus gave plaintiff a separate memorandum in which he criticized plaintiff's performance in a number of areas and described her performance as "marginally satisfactory." In addition, Colonel Goodall wrote in a handwritten letter, apparently directed toward Colonel McManus, that "[w]hile Ms. Howard did many good things . . . her overall manner of performance is ranked satisfactory by me for the period Jan.-Oct. '79."

On April 18, 1980, Colonel McManus notified plaintiff that a within grade step increase in salary (from GS-13 (Step 2) to GS-13 (Step 3)), scheduled for approval on April 19, 1980, was being withheld due to performance deficiencies and that a second determination on whether to withhold this step increase would be made after sixty days, but no later than June 19, 1980. Colonel McManus, on June 17, 1980, told plaintiff that he had decided to withhold the step increase. Plaintiff was also informed of her right to appeal the decision made by Colonel McManus to the Deputy Commander. Plaintiff believed this decision was based on sex discrimination, and sought EEO counseling from Ms. Mary McDavid, an employee and EEO Counselor at DARCOM's Automated Logistic Management Systems Activity.

Colonel McManus, on August 1, 1980, gave plaintiff an official "warning notice of unsatisfactory performance." This notice listed a number of performance deficiencies and informed plaintiff that if her performance did not improve to a satisfactory level within 90 days, action to re-

move plaintiff from her position would be considered. Following this notice plaintiff, on August 14, 1980, filed a charge of reprisal regarding the August 1, 1980, warning. Plaintiff claimed that this warning was given her because she claimed Colonel McManus discriminated against her on the basis of her sex. Plaintiff's EEO Counselor informed her that informal resolution of the discrimination claim had failed. On September 29, 1980, plaintiff filed a formal complaint of discrimination claiming that Colonel McManus discriminated against her on the basis of her sex in denying her the April, 1980, within grade step increase. Plaintiff also complained that the "warning notice of unsatisfactory performance" and certain other acts of Colonel McManus were in reprisal for plaintiff's pursuing her EEO rights.

On October 26, 1980, plaintiff submitted a second reprisal allegation regarding receipt of a memorandum from Colonel McManus on October 20, 1980, concerning alleged performance counseling sessions from June 26, 1980, to September 24, 1980. Plaintiff, on November 11, 1980, also filed an amendment to her complaint of discrimination by claiming that she was discriminated against because she was white.

Plaintiff, on December 1, 1980, received from Colonel McManus a "notice of proposed change to a lower grade," which informed plaintiff of McManus's proposal to downgrade her from the EEO Officer position and place her in a GS-11 Supply Cataloger position. Plaintiff had previously served the government as a Supply Cataloger. On January 7, 1981, plaintiff met with the Deputy Commander of TSARCOM to reply to the proposed downgrade. This

meeting did not result in a change or cancellation of the proposed downgrade. Later in January, General Konopnicki, TSARCOM's Commander, refused a petition to stay the downgrade until receipt of the investigative report in plaintiff's EEO complaint. On February 8, 1981, plaintiff was downgraded to the position of Supply Cataloger, GS-2050-11 (Step 10), with an annual salary of $29,236. At the time of the downgrade, plaintiff was earning $33,116 per year. A male replaced plaintiff as an EEO officer.

On July 19, 1982, plaintiff, citing reprisal for having pursued a discrimination complaint and continuing discrimination at TSARCOM, resigned her position as a Supply Cataloger and has not since been employed by the United States Government. Subsequent to this resignation, plaintiff filed a discrimination complaint contending that her resignation was coerced, involuntary and resulted from TSARCOM's Command Group's refusal to permit her to advance in her career because of reprisal and continuing discrimination against her. After having exhausted her administrative remedies, plaintiff filed her complaint in this Court under Title VII of the Civil Rights Act of 1964.

II

In *McDonnell Douglas Corp. v. Green,* 411 U.S. 792 (1973), the Supreme Court, speaking through Justice Powell, established the now familiar burdens in a Title VII case. Plaintiff bears the initial burden of showing a *prima facie* case. If plaintiff establishes a *prima facie* case, the burden shifts to the defendant to articulate some legitimate, nondiscriminatory reasons for the adverse employment action. Should the defendant meet this burden, the

plaintiff must then demonstrate that the legitimate reasons offered by the defendant were but a pretext for discrimination.

The ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against plaintiff remains with the plaintiff. The intermediate evidentiary burdens outlined above serve to bring litigants and the Court expeditiously and fairly to a resolution of plaintiff s claim of intentional discrimination. *Texas Department of Community Affairs v. Burdine,* 450 U.S. 248, 253 (1981). The question facing triers of fact in discrimination cases is both sensitive and difficult. The prohibitions against discrimination contained in the Civil Rights Act of 1964 reflect an important national policy, and proof of intentional discrimination will often rest only on circumstantial evidence. *United States Postal Service Board of Governors v. Aikens,* 460 U.S. 711, 716-17 (1983).

Plaintiff maintains that the decision to downgrade her from an EEO Officer to a Supply Cataloger, along with her poor performance ratings, were the result of unlawful sex and race discrimination, and in retaliation for filing a complaint of discrimination. A *prima facie* case of discriminatory downgrading or performance rating is established if plaintiff shows by a preponderance of the evidence: (1) that she was a member of the protected class, (2) that she was downgraded or rated poorly, and (3) that the complained of adverse employment actions were taken under circumstances which give rise to an inference of unlawful discrimination. *See McDonnell Douglass Corporation v. Green,* 411 U.S. 792, 802 (1973); *Womack v. Munson,* 619 F.2d 1292, 1296 (8th Cir. 1980), *cert.*

denied, 450 U.S. 979 (1981); B. Schlei, P. Grossman, *Employment Discrimination Law,* 596 (1983).

III

The charges and countercharges that punctuated the trial of this lawsuit all focus around the central theme of plaintiff's managerial ability. Defendant claims that plaintiff could not properly fulfill the task entrusted her as an EEO Officer; plaintiff claims that she was not given an EEO office through which she could accomplish her tasks. Plaintiff further claims that she was sacrificed to placate the legitimate EEO concerns of black male employees at TSARCOM, who claimed that they were discriminated against on a class-wide basis. The Court is struck by the tensions and inflamed atmosphere that surround TSARCOM's employees at the time plaintiff was its EEO Officer. TSARCOM had recently been created out of the merger of two separate Army Commands, and much controversy surrounded employment decisions. Plaintiff as EEO Officer, therefore, had many demands placed on her and played a crucial role in TSARCOM's successful operation.

The Court has carefully examined and reflected on the weeks of testimony and the volumes of exhibits that comprise the proof in this case and finds that plaintiff has not demonstrated even a *prima facie* case of discrimination. Plaintiff, although faced with a difficult task and a shortage of full-time personnel, has failed to show that she was downgraded under circumstances which give rise to an inference of unlawful discrimination. Plaintiff called to the attention of her superiors the lack of full-time personnel in the EEO office, and her superiors came to her aid and as-

signed employees to the EEO office on a part-time basis. Plaintiff, however, was not able to properly manager her office and meet appropriate and reasonable due dates on the many important projects under her care. Plaintiff has not shown that she was used as a pawn of the Command Group to placate the concerns of black males with regard to charges of class-wide discrimination against them at TSARCOM. Furthermore, even if plaintiff had demonstrated a *prima facie* case of discrimination, this Court concludes that defendant has articulated legitimate nondiscriminatory reasons for his actions which the plaintiff has failed to show were a pretext for illegal discrimination—namely, plaintiff was not capable of managing the EEO office at TSARCOM.

From the voices of those who sat in the witness box and the thousands of pages of documents reviewed by the Court there echoes forth with resounding clarity the conclusion that plaintiff, although a dedicated employee, lacked the managerial ability to effectively operate the EEO office. Plaintiff was supplied with the resources needed to conduct an effective operation of the EEO office; she, however, could not manage the resources given her. Indeed, she could not even accomplish the crucial task of filling vacant positions in her office. In the fall of 1979 plaintiff was faced with numerous EEO complaints that needed attention and the lack of some full-time staff to fill positions which were authorized. When plaintiff received a list of people to choose for the position, she returned the list because in her opinion only two of the three names listed were qualified and she was concerned about the selection process. Following this incident Colonel McManus was forced to exercise her selection authority for her.

In addition, plaintiff was authorized 35 EEO Counselors to assist her. EEO Counselors are employees who devote part of their time to handling charges of discrimination informally before a formal complaint is filed. Once a formal complaint is filed the TSARCOM EEO office is to gather the necessary documentation, including the report of the EEO Counselor, and forward the complaint to DARCOM's EEO office within three days of the complaint being filed. TSARCOM does not conduct the investigation into the charges in a formal complaint; that task is assigned to the United States Army Civilian Appellate Review Agency. Plaintiff was assigned numerous people on short and long term details to assist her in timely forwarding formal complaints of discrimination to DARCOM. Plaintiff, although having the necessary resources, failed to both properly prepare and timely forward formal complaints to DARCOM. Plaintiff's failure in this regard resulted in disruptions to the EEO process and prompted much criticism from DARCOM.

Plaintiff was unable to timely and properly prepare an affirmative action report, even though an Affirmative Action Plan Program Committee was formed consisting of eight members to assist in the preparation of a plan. Plaintiff failed to provide proper and timely evaluation of EEO program progress in relation to established objectives. In sum, plaintiff could not properly set priorities, delegate responsibility, and often became absorbed in minutia and detail. Plaintiff was often told of the problems existing in her EEO office, and given the opportunity and the resources needed to correct them if she could only manage them properly. She, however, could not.

Plaintiff was both a sincere and a hard worker; she was not, however, a good manager, and the actions taken against her were not based on her race, her sex, or her decision to file charges of discrimination.

IV

Plaintiff also claims that she was constructively discharged from her position as a Supply Cataloger. The decision to downgrade plaintiff to the Supply Cataloger position was not illegal discrimination, and thus may not be considered in plaintiff's claim of constructive discharge. Another ground on which plaintiff's constructive discharge claim rests is a comment allegedly made by her supervisor in the supply position that if she did not drop her EEO complaint, she would go nowhere in her career and may suffer further adverse action. Even if this comment were made, this comment, along with the other evidence adduced by plaintiff, is not sufficient for a conclusion that plaintiff was constructively discharged from her employment.

The law in the Eighth Circuit on constructive discharge is not completely clear. *Johnson v. Bunny Bread Co.*, 646 F.2d 1250 (8th Cir. 1981) held that "[t]o constitute a constructive discharge, the employer's actions must have been taken with the intention of forcing the employee to quit." *Id.* at 1256. However, a different panel, in *Barrett v. Omaha National Bank*, 726 F.2d 424 (8th Cir. 1984), did not include intent in the definition of constructive discharge and said "[a]n employee is constructively discharged when he or she involuntarily resigns to escape intolerable and illegal employment requirements." *Id.* at 428. There exists disagreement in other circuits with re-

spect to the intent requirement. B. Schlei, P. Grossman, *Employment Discrimination Law,* 611 (1983).

Under either standard, however, plaintiff has failed to demonstrate that she was forced into resigning her position as a Supply Cataloger. Her work environment was not so intolerable that a reasonable person could no longer be expected to remain on the job. The comment by plaintiff's supervisor, if true, has no place in the workplace; however, the evidence presented to the Court is insufficient for a finding of constructive discharge. If plaintiff's supervisor made numerous comments similar to the one attributed to him by plaintiff, the result may have been different. Such, however, was not the case.

Judgement will be entered in favor of defendant. Defendant in his answer did not request attorneys' fees, and none will be awarded.

Dated this 11th day of July, 1985.

/s/ Edward L. Filippine
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 85-2081

Barbara Bailey Howard,
Appellant,
v.
John O. Marsh, Jr., Secretary of the Army,
Appellee.

* Appeal from the United
* States District Court
* for the Eastern District
* of Missouri.
*

Submitted: November 11, 1986
Filed: December 23, 1986

Before BOWMAN, Circuit Judge, FLOYD R. GIBSON, Senior Circuit Judge, and ARNOLD*, District Judge.

PER CURIAM.

Barbara Bailey Howard appeals the district court's[1] judgment in favor of John O. Marsh, Jr., Secretary of the Army, on her Title VII race and sex discrimination and constructive discharge claims. After careful review of the record and briefs of the parties we find that the judgment of the district court is based on findings of fact that are not clearly erroneous and that no error of law appears. Consequently, we affirm on the district court's comprehensive and well reasoned opinion. *See* 8th Cir. R. 14.

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*The Honorable Morris S. Arnold, United States District Judge for the Western District of Arkansas, sitting by designation.

[1]The Honorable Edward L. Filippine, United States District Judge for the Eastern District of Missouri.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 85-2081EM

Barbara Bailey Howard, Appellant, v. John O. Marsh, Jr., Secretary of the Army, Appellee.	* Appeal from the United * States District Court * for the Eastern District * of Missouri.

Appellant's petition for rehearing en banc has been considered by the Court and is denied.

Petition for rehearing by the panel is also denied.

February 24, 1987

Order entered at the Direction of the Court:

/s/ Robert S. St. Vrain
Clerk, U. S. Court of Appeals, Eighth Circuit.

APPENDIX B

Plaintiff Trial Exhibit 3

Ms. Howard performed her duties during the period 1 Jan. 1979 - 14 Oct. 1979 in a satisfactory manner. During most of this time her office was short 2 or 3 action officers which caused her to constantly be late in meeting requirements. However, she did an outstanding job of developing an EEO program for the command. To accomplish this required her to work many hours overtime. She also greatly increased the command's affirmative action awareness during this period. Ms. Howard did an outstanding job of organizing the EEO counselor program. Ms. Howard constantly researched contemporary civil rights/EEO legal findings and read many professional publications to keep up with her field. While Ms. Howard did many good things and worked under a handicap, her overall manner of performance is rated satisfactory by me for the period Jan.-Oct. '79.

A. J. Goodall

Received from Col. Booker T. McManus on 16 June 1980, under provisions of Freedom of Information Act/Privacy Act Request.

B. Bailey Howard

JOINT EXHIBIT 7

MERIT SYSTEMS PROTECTION BOARD

SUPERVISORY APPRAISAL OF DEMONSTRATED PERFORMANCE OR POTENTIAL

Announcement No.: OSC-79-01

PLEASE HAVE THIS APPRAISAL COMPLETED BY YOUR SUPERVISOR AND SUBMIT IT WITH YOUR APPLICATION, SF-171 (If the appraisal is submitted directly by the Supervisor, the Applicant will be permitted to review and/or obtain a copy of the appraisal upon request.)

Name of Applicant: B. Bailey Howard

Position: Personnel Management Specialist GS-201-11/12/13

Basis for Appraisal	RANKING FACTORS	Level of Performance
Check One	(Knowledges, skills, abilities, and personal characteristics)	Please check (X) as appropriate:
1. Outside Activities 2. On-the-Job Performance 3. Formal Training 4. Unable to Appraise		4. Exceptional 3. Above Average 2. Average/ Satisfactory 1. Rarely Satisfactory 0. Unsatisfactory
1 2 3 4		4 3 2 1 0
X	Knowledge of Federal Personnel Laws, Rules, and Regulations, along with implementing policies and procedures relating to personnel operations in Federal agencies.	X
X	Analytical and conceptual situations.	X
X	Identifying deviations from proper practice.	X
X	Knowledge and skill in investigative techniques.	X

X	Written and Oral communication Ability.	X

NARRATIVE: BRIEFLY EVALUATE THE CANDIDATE'S OVERALL ABILITY TO PERFORM THE DUTIES AND RESPONSIBILITIES OF THE POSITION. IF MORE SPACE IS REQUIRED, USE THE BACK OF THIS PAGE NARRATIVE COMMENTS ARE REQUIRED FOR ALL EVALUATIONS.

Ms. Howard has manifested the propensity for performing as a personnel management specialist in an exemplary manner. Her knowledge of Federal personnel laws, rules and regulations exceed those of her peers. Her written and oral communication abilities are outstanding.

IN WHAT CAPACITY ARE YOU MAKING THIS APPRAISAL? (Please X as appropriate)

X Present Immediate Supervisor

☐ Former Immediate Supervisor

☐ Present 2nd Level Supervisor

☐ Former 2nd Level Supervisor

☐ Other (Specify)

Period During Which You Supervised the Applicant:
From: 9 October 1979 To: Present

Appraiser:
BOOKER T. McMANUS, COL, GS, Chief of Staff

(Date) 17 Dec 79 (Phone No.) (314) 263-2209

/s/ Booker T. McManus

SPB FORM NO. 22

The Merit System Protection Board Is An Equal Opportunity Employer

COMPLAINT EXHIBIT 9

EMPLOYEE PERFORMANCE RATING

For use of this form, see HDQA Ltr 690-76-19 and instructions on page 4 of this form; the proponent agency is Office, Deputy Chief of Staff for Personnel.

CHECKLIST FOR APPRAISING SUPERVISORY PERFORMANCE IN EQUAL EMPLOYMENT OPPORTUNITY

1. *Personal Commitment to the Equal Employment Opportunity Program.*

	YES	NO	NA
a. Does the supervisor/manager assure full integration of equal employment opportunity principles and intent in all aspects of personnel management within his/her own organization?	X		
b. Has the supervisor/manager taken an active role in implementing the activity's EEO action plan goals and objectives within the unit supervised?	X		
c. Are grades or occupations within the workgroup supervised proportionately distributed relative to minority group, sex, or age range?	X		
If not, have the causes been identified and, where appropriate actions planned and/or initiated?			X
d. Does the supervisor/manager maintain continuous review of internal policies, practices, and procedures with a view toward avoiding or eliminating those which may discriminate against or give offense to any individual or group of employees?	X		
e. Does the supervisor/manager take positive steps to assure acceptance of minority group and women employees in the work group, to include setting a personal example?	X		

2. *Selection and Promotion.*

a. Has the supervisor/manager established any written objectives (goals and time-

	YES	NO	NA
tables) in support of the activity EEO affirmative action plan?	X		
Has action been taken to achieve these goals?	X		
b. In filling vacancies does the supervisor/manager give full consideration to all qualified candidates, including minorities, women, and persons in the 40-65 age range?	X		
b. Is supervisor/manager action to reduce/eliminate the causes of complaints effective?	X		

7. *Remarks.* (Continue on plain bond paper if necessary.)

Ms. B. Bailey Howard can be depended upon to be fair and objective in dealing with members of her staff and/or a member of the Command. She is supportive of minorities and women.

EEO Performance Appraisal (Check One) ( ) Outstanding, (√) Satisfactory, ( ) Unsatisfactory

SIGNATURES TYPED NAME AND ORGANIZATION DATE

Rating Supervisor[1]

/s/ Booker T. McManus, BOOKER T. McMANUS, COL, GS Chief of Staff 21 Mar 80

Employee[2]

/s/ B. Bailey Howard, B. BAILEY HOWARD, EEO Officer, 9 Apr 80

FOOTNOTES

1 The rating supervisor's signature certifies that the completed checklist has been discussed with the employee.

2 Employee's signature indicates that the completed checklist has been discussed and that the employee is aware of the appraisal assigned. It does not necessarily indicate agreement with the appraisal.

Reviewing Official[3]

/s/ James M. Hesson, COL(P), GS, Deputy Commander, 28 Mar 80

Approving Official

COMPLAINT EXHIBIT 8
EMPLOYEE PERFORMANCE RATING

* * *

3. *Training.*

	YES	NO	NA
a. Have training funds expended and/or types of training opportunities provided been disproportionate relative to minority group, sex, or age?		√	
b. Has the manager assured that subordinate managers and supervisors receive formal equal employment opportunity training on a scheduled basis?	√		

4 *Upward Mobility.*

	YES	NO	NA
a. Has the supervisor/manager initiated action whenever possible to reengineer or structure positions to provide upward mobility opportunities?			√
b. Has the supervisor/manager reviewed the qualifications of employees to identify those who are under-utilized in terms of knowledges, skills, and abilities?			√
If any were so identified, have they been counseled and provided guidance which may enhance their potential for advancement?			√
Have higher level management and the personnel office been informed of these actions?			√

---

[3] When an overall satisfactory performance rating is being assigned, the reviewing official is normally also the approving official.

5. *Recognition.*

a. Is appropriate formal and informal recognition of minorities and women in the unit distributed proportionately? √

If not, has the supervisor/manager analyzed the cause and taken corrective action or provided an acceptable reason? √

b. Is there any disparity in the types of awards received by minorities and women compared to those received by non-minorities and men for the same level of achievement? √

6. *Discipline.*

a. Does the supervisor/manager assure that like penalties are applied for like offenses? √

If any group of employees receives a disparate share of disciplinary actions, hase the cause been identified and has corrective action been initiated if necessary? √

b. Is supervisor/manager action to reduce/eliminate the causes of complaints effective? √

7. *Remarks.* (Continue on plain bond paper if necessary.)

Ms. Howard is the Command EEO Officer! She has done considerable work with her employees on their SKAP which has resulted in at least one promotion.

EEO Performance Appraise (Check One) (√) Outstanding, ( ) Satisfactory, ( ) Unsatisfactory

SIGNATURES TYPED NAME AND ORGANIZATION DATE

Rating Supervisor[1]

/s/ A. J. Goodall 18/May

FOOTNOTES

[1] The rating supervisor's signature certifies that the completed checklist has been discussed with the employee.

Employee[2]

/s/ B. Bailey Howard 22/May

Reviewing Official[3]

(Illegible) 18 May 79
Approving Official

---

[2] Employee's signature indicates that the completed checklist has been discussed and that the employee is aware of the appraisal assigned. It does not necessarily indicate agreement with the appraisal.

[3] When an overall satisfactory performance rating is being assigned, the reviewing official is normally also the approving official.

EMPLOYEE APPRAISAL
COMPLAINT

EXHIBIT 18

INSTRUCTIONS: This appraisal will be used for counseling and promotion purposes. Rate the effectiveness of the employee on each factor by placing a "X" in the box that best describes the employee's performance in that area. Taking into account past performance, evaluate the employee on all factors. Section I will be completed on each employee. The third description represents the average evaluation or the typical effectiveness of a fully adequate employee *EEOC*-wide, not necessarily one in your unit, branch, division or office. Complete Section II for employees who hold supervisory positions or are ready to be considered for supervisory positions. If the person is not in a supervisory position, evaluate the employee on his/her potential for supervisory capacity. An "average" rating means the normal performance expected of an employee in that grade or job. Complete Section III only on employees who now hold management/administrative positions or are being considered for such positions. Section IV will be completed on each employee.

A. PRODUCTIVITY

X Consistently turns out more work than most employees

B. QUALITY OF WORK

X Consistently thorough and accurate (seldom makes errors)

C. KNOWLEDGE REQUIRED BY JOB

X Has exceptional knowledge/info for, performing the job

D. DEGREE OF SUPERVISION REQUIRED

X Demonstrates exceptional initiative/judgment etc. in all situations

E. DEPENDABILITY

X Completes each task, meets deadlines etc. with minimum of supervision

F. ACCEPTANCE OF RESPONSIBILITY

X More willing and able than most to assume additional duties

G. ADAPTABILITY

X Unusual (applies new ideas/approaches with enthusiasm)

H. WRITTEN COMMUNICATION

X Clear/effective and organized to suit objective (requires editing rarely)

I. ORAL COMMUNICATION

X Shows organization/consistent in expression (speaks well, to point)

J. ATTEMPTS TO IMPROVE

X Learns new skills, etc. to help career development

K. INDUSTRIOUSNESS

X Puts every possible effort into work

Employee was rated highest (above average) in all the following categories

A. ORGANIZATION AND MANAGEMENT ABILITIES (Cont.)

• • •

6. Coordinates and integrates the work of subordinate employees or organizational segments effectively
7. Resolves organizational, management, personnel, and technical problems
8. Fully understands, is receptive to and effectively implements EEO policies

B. COMMUNICATION ABILITIES

1. Communicates effectively with management and employees and, when appropriate, employee groups
2. Fosters an attitude of responsive service to the public
3. Maintains poise, handles controversial or delicate matters skillfully
4. Persuades others to consider and accept his position or point of view
5. Communicates effectively with individuals/groups of different backgrounds, levels of educational attainment, and personal, program, or organizational aims and interests

C. PERSONAL ATTRIBUTES

1. Adjusts to change, work pressures, or difficult situations without undue stress
2. Is able and willing to judge people and situations on the facts
3. Considers new ideas or divergent points of view
4. Has a positive outlook toward the work and the employing organization

5. Has confidence in own ability

6. Has the courage of convictions

IV. TO BE COMPLETED ON ALL EMPLOYEES

A. SUMMARY EVALUATION

(Based on the employee's rate of progress and your judgment of his/her potential, select ONE of the following items to indicate readiness for the increased responsibilities at the next higher level or position. Consider the individual's overall potential when determining, in your opinion, if the employee has reached the peak of his/her ability in job performance or is ready for and capable of assuming additional responsibilities.)

X Ready for promotion now. Very good prospect for more difficult assignments.

B. NARRATIVE SUPPORTING STATEMENT FOR ABOVE EVALUATION

(Briefly describe the employee's weak and strong points. Indicate any factors which you feel might interfere with or retard the employee's progress or development. Include personal traits or deficiencies such as lack of endurance, vigor, etc.)

Highly professional—knows technical details, keeps up to date in EEO field. Very strong in her convictions. Fair and mature in judgment. Seeks responsibility, uses imagination, strong manager.

• • •

M. ABILITY TO WORK WITH OTHERS

X Cooperative, tolerant, able to work with others to accomplish tasks

N. RESOURCEFULNESS

X Displays creativity and imagination in the absence of guideline/rules

O. JUDGMENT

X Consistently logical (considers facts, weighs alternatives, etc.)

P. ORGANIZING AND PLANNING WORK

X Effective (increased productivity while maintaining quality)

Q. ABILITY TO WORK WITH GROUP

X Performs well (shows interest, enthusiasm, strong support)

II. COMPLETE ON SUPERVISORS OR PERSONS CONSIDERED FOR SUPERVISORY POSITIONS

Employee was rated highest (above average) in all the following categories*

1. Defines and plans assignments/projects clearly
2. Carries out assignments effectively
3. Delegates authority and responsibility and works with and through others effectively
4. Instructs, guides, and reviews the work of others effectively
5. Establishes and maintains high standards of quality and quantity for the work produced
6. Is fair and objective in dealings with and judgments of subordinates
7. Motivates, trains, develops, and guides employees of varied backgrounds and skilled levels effectively
8. Fully understands, is receptive and effectively implements EEO policies.

III. COMPLETE ON PERSONS IN OR BEING CONSIDERED FOR MANAGEMENT/ADMINISTRATIVE POSITIONS

A. ORGANIZATION AND MANAGEMENT ABILITIES

1. Devises economical and effective organizational or operational plans and procedures
2. Establishes program objectives or performance goals and assesses progress toward their achievement
3. Adjusts work activities and schedules to meet emergency conditions or unanticipated requirements *(rated average)
4. Understands, interprets, and gains support for management goals and objectives
5. Develops improvements in or designs new work methods and procedures

Form May Be Used

EEOC Form 173 Mar 75 Previous Editions of This Form May Be Used.

DATE: 26 Sep 79

Typed Name and Title

B. Bailey Howard
USA TSARCOM EEO OFFICER

/s/ B. Bailey Howard

JOINT EXHIBIT 1, AGENCY EXHIBIT 3

Summary—Table of Distribution and Allowances (TBA) TSARCOM Equal Employment Opportunity Office

Date of TDA	Position	Grade	Authorized Spaces
15 Sep 78	Chief	GS 13	1
	EO Specialist	GS 12	1
	EO Specialist	GS 11	2

Date of TDA	Position	Grade	Authorized Spaces
	Clerk/Steno	GS 04	1
			5
30 Jun 80	Chief	GS 13	1
	EO Specialist	GS 12	2 (space upgrade)
	EO Specialist	GS 11	1
	Clerk/Steno	GS 04	1
			5
16 Mar 81	Chief	GS 13	1
	EO Specialist	GS 12	2
	EO Specialist	GS 11	1
	EO Specialist	GS 08	1
	Secretary	GS 06	1
	Clerk/Steno	GS 04	1
			7
27 May 81	(Human Relations—RREO/PTFD)		
	EO Officer	CPT/03	1
	EO Senior NCO	SFC/E7	1
	EO Sergeant	SGT/E6	1
	EO Sergeant	SGT/E5	2
	EO Specialist	GS 09	1
	Training Tech	GS 05	1
	Secretary	GS 04	1
			8
25 Nov 81 (proposed)	Chief	GS 13	1
	EO Specialist	GS 12	2
	EO Specialist	GS 11	1
	EO Assistant	GS 08	1
	Secretary	GS 06	1
	Clerk/Steno	GS 04	1 (7)
	EO Officer	CPT/03	1
	EO Senior NCO	SFC/E7	1
	EO Sergeant	SGT/E5	2

Date of TDA	Position	Grade	Authorized Spaces
	EO Specialist	GS 09	1
	Training Tech	GS 05	1
	Clerk/Steno	GS 04	1 (7)
			14

JOINT EXHIBIT 3, TAB 28

DRSTS-QC 21 December 1979

SUBJECT: Personnel Selection Authority

Ms. B. Bailey Howard
Equal Employment Opportunity Office
US Army Troop Support and Aviation
Material Readiness Command
4300 Goodfellow Blvd
St. Louis, Missouri 63120

1. Reference Equal Employment Opportunity Officer (Employment) GS-160-13, position description, Job Number 14,247-S, copy attached.

2. Paragraph 6 of referenced position description provides for ". . . delegated personnel management responsibilities and makes such review of completed work as is deemed necessary or appropriate."

3. Inherent in the personnel management responsibilities of a supervisor is the authority to make selections in filling positions. However, effective this date, and until further notice, the selection authority for the positions in the Equal Employment Opportunity Office, Headquarters, TSARCOM, will be retained by the undersigned.

4. This action is not intended to reflect on your competence in the selection process, but rather, is deemed necessary due to the extreme sensitivity of the Command's

Equal Employment Opportunity Program posture. Staffing of the Equal Employment Office during the present critical period will have a direct impact on the future advancement of the EEO Program, and work force perceptions of the Command's interest in Program improvement.

5. During the period in which I will retain selection authority, I will continue to rely on you to carryout all other aspects of the personnel management responsibilities, to include development and training of new members of the EEO Office as assigned.

FOR THE COMMANDER:

Booker T. McManus
Colonel, GS
Chief of Staff

JOINT EXHIBIT 7, EXHIBIT 9

(SEAL)

N F F E
NATIONAL FEDERATION OF FEDERAL EMPLOYEES

50 Years of Service to Federal Employees and the Nation

March 12, 1981

TO WHOM IT MAY CONCERN:

I have known Ms. Barbara Bailey Howard in a professional capacity for the past two years. There have been numerous occasions where her input and cooperation were necessary to maintain an amicable relationship between labor and management. She was a critical element in the union acceptance of the Affirmative Action Program Plan for US Army Troop Support and Aviation Materiel Readiness Command during the past year. Without a doubt her

sincerity, dedication and impartiality was conducive to an early agreement. Ms. Howard has shown a willingness to participate in all matters involving her position as the EEO Officer at TSARCOM.

Sincerely,

/s/ R. J. Kaiser
R. J. KAISER
President
NFFE Local 405

JOINT EXHIBIT 7, EXHIBIT 9, P. 16

(SEAL)

DEPARTMENT OF THE ARMY

Mr. Ross/gh/AUTOVON 793-3202
Headquarters, US Army Armament Materiel
Readiness Command
Rock Island, Illinois 61299

Reply to Attention of:

DRSAR-PTC-C 21 DEC 1979

SUBJECT: Qualifications Summary, Ms. B. Bailey Howard

Received DEC 31 1979

Ms. M. Marie Glover
Personnel Management Specialist
Office of Administration
Office of The Special Council
1717 H Street, NW
Washington, DC 20419

This letter is to provide information as concerns the work history of Ms. B. Bailey Howard in addition to the in-

closed qualification analysis and appraisal form. For approximately three years Ms. Howard worked as Federal Womens Program Manager and often as the Acting Equal Employment Opportunity Officer at this headquarters. My involvement came about through assignment as the Equal Employment Opportunity Action Officer in the Personnel Directorate.

I was able to participate with her on a number of projects and observed her role in others. These included, but were not limited to, the preparation of affirmative action plans, recommendations to the commander on disposition of EEO complaints, special study on several career fields where few or no women were employed, an assistance visit checklist and guide for use at subordinate installations, review and analysis charting and narrative, and a special study on the upward mobility program.

During each of these projects I found Ms. Howard to be a very capable and industrious person. While her knowledge of the Federal Personnel Manual may not be equivalent to that of a personnelist at the GS-13 level, there is no doubt in my mind but that she will be able to function as a personnelist with minimal orientation.

/s/ David Ross

DAVID ROSS
Personnel Management Specialist

1 Incl
as

JOINT EXHIBIT 7, EXHIBIT 9, PAGE 12

(SEAL)

DEPARTMENTS OF THE ARMY
AND THE AIR FORCE
NATIONAL GUARD BUREAU
WASHINGTON, D.C. 20310

RECEIVED 1980 FEB 4 AM 11:46

NGB-HR 31 January 1980

Ms. M. Marie Glover
Personnel Management Specialist
Office of Administration
Office of the Special Council
1717 H Street, NW
Washington, DC 20419

Dear Ms. Glover:

I hope that it is not too late to accept the enclosed appraisal form that addresses the qualifications of Ms. B. Bailey Howard for the position of Personnel Management Specialist, GS-11/12/13. I have been on TDY and there was also a problem associated with the postal service.

I have been associated with Ms. Howard for approximately five years, as a staff supervisor of her responsibilities in the Federal Women's Program. Ms. Howard has indepth knowledge and insight into the various systems that impact positively and negatively upon the areas of personnel management.

While her job occupation series has not been associated with civilian personnel administration, she has consistently demonstrated knowledge of the Federal Personnel Manual and of personnel management concepts and techniques. In addition, she has also received OJT orientation within civilian personnel offices and other formal training in civilian personnel administration functions.

I have been most impressed by Ms. Howard's ability to condense large amounts of data into a well developed presentation (written or verbal). She demonstrates technical and analytical abilities that lead toward a finished product of highly developed recommendations based upon indepth analysis of findings and well established conclusions. Ms. Howard has introduced, "sold", and been instrumental in the implementation of innovative management techniques that have resulted in more effective and economical operations. She has a sound and knowledgeable base of management skills and techniques that she utilizes in an outstanding manner.

She has outstanding communication skills that have been demonstrated in the reports that she has provided and in the large demand for her public speaking appearances.

She has an excellent ability to grasp data and capability of learning rapidly.

I would highly recommend Ms. Howard as a candidate for the vacancy in your agency. She would be a definite asset to any organization.

Sincerely,

/s/ R. M. Gnadt
R. M. GNADT
Special Assistant for Minority Affairs
National Guard Bureau

1 Enclosure
as stated

JOINT EXHIBIT 7, EXHIBIT 9, PAGE 23

6728 ETZEL
UNIVERSITY CITY, MO 63130

MARCH 12, 1981

COL ROBERT DACEY
COMMANDER
ST LOUIS DISTRICT
CORP OF ENGINEERS
210 NORTH TUCKER
ST LOUIS, MO 63101

SUBJECT: LETTER OF REFERENCE

I have had the pleasure of knowing Ms. B. Bailey Howard since approximately December 1978 when she was assigned the position of Equal Employment Opportunity Officer at US Army Troop Support & Aviation Materiel Readiness Command.

During this time I have been involved with Ms. Howard in numerous meetings that impacted on many management procedures and employee morale. Her knowledge of various laws, regulations and written policy leaves little to be desired. She expresses her thoughts, concepts and interpretations of regulatory documents both orally and written in an outstanding manner.

Ms. Howard is industrious, diligent and has the perseverance to be an asset to any organization to which she may be assigned.

Yours truly,

/s/ Arthur F. Ransom
ARTHUR F. RANSOM

JOINT EXHIBIT 7, EXHIBIT 9, PAGE 25

DRSTS-P 13 MARCH 1981

Colonel Robert Dacey
Commander
US Army St. Louis District Corps
of Engineers
210 No. Tucker
St. Louis, MO 63101

Dear Colonel Dacey:

I am writing this letter on behalf of Ms. B. Bailey Howard, an applicant for your Administrative Officer vacancy.

Ms. Howard has been a colleague of mine since December 1978 and a valued and trusted advisor.

As the Director of an organization consisting of approximately 500 men and women, some problems naturally develop, be they real or imaginary.

I have found that Ms. Howard was always available to objectively dig in, assess the problem and work out a solution that was reasonable and fair. She is truly a professional in every sense of the word.

As a staff advisor to me, I found her advice to be honest, straightforward, and above all, fair. I was comfortable dealing with her personally or with her people. I felt she had a rapport with the other professionals under her direct management that was first rate. I felt her ability to deal with various usually highly emotional issues to be cool and professional. In addition, under much stress and emotion, her ability to communicate, both orally and in writing, was superb. In particular, her talent and demeanor were always evident in the many face to face meetings we held.

I am concerned that the almost impossible situation with which she had to deal with after the threatened Black

Male Class Action will unfairly be held against her and I would hope that in the spirit of equal treatment, she will be given the opportunity to prove her very valuable worth.

Sincerely,

THOMAS J. KEENAN
Director of Procurement
and Production

JOINT EXHIBIT 7, EXHIBIT 9, PAGE 21

DEPARTMENT OF THE ARMY
HEADQUARTERS, UNITED STATES ARMY
DENTAL ACTIVITY
Fort Leonard Wood, Missouri 65473

(SEAL)
ATZT-DA 22 MAY 1980

THRU: MG Richard Thompson
US Army Troop Support and Aviation
Material Readiness Command
4300 Goodfellow Blvd.
St. Louis, MO 63120

TO: Equal Employment Opportunity Officer
US Army Troop Support and Aviation
Material Readiness Command
ATTN: MS Barbara B. Howard
4300 Goodfellow Blvd.
St. Louis, MO 63102

I wish to personally thank you and express my sincerest appreciation for your outstanding performance in a recent settlement of an EEO dispute. Your exceptional professional knowledge and technical ability to uncover and reveal the basic underlying issues of the dispute enabled all parties concerned, through your guidance, to arrive

at an impartial, fair, and amicable solution to the overlying problems presented at the hearing.

Without the benefit of your expertise, this dispute could easily have exacerbated into a major problem and very unpleasant situation. I am happy to report that, with the application of your services, this unfortunate situation has been averted and brought to a very successful conclusion.

Thank you again.

Sincerely,

/s/ Gene C. Hose
Colonel, Dental Corps
Commanding

JOINT EXHIBIT 7, EXHIBIT 9, PAGE 22

UNITED STATES ARMY TROOP SUPPORT AND AVIATION MATERIEL READINESS COMMAND
St. Louis, Missouri

LOGO

CERTIFICATE OF APPRECIATION
TO
B. BAILEY HOWARD

For your excellent performance, outstanding contribution and valuable assistance in making the TSARCOM Management Association Panel Discussion a success.

/s/ Booker T. McManus
Colonel, GS
President, TSARCOM
Management Association

/s/ Richard H. Thompson
Major General, USA
Commanding

DATE 24 JANUARY 1980

04-81-014-E

DEFENDANT'S EXHIBIT 10, 9, PAGE 7

CAREER REFERRAL LIST

For use of this form, see HQDA Letter 690-78-25

The proponent agency is Office,
Deputy Chief of Staff for Personnel

PLEASE READ REQUESTING ACTIVITY
INSTRUCTIONS ON REVERSE SIDE
BEFORE USING THIS FORM

1. REQUESTING ACTIVITY

(Name, mailing address, and ZIP Code)

Commander
US Army Troop Support & Aviation
Materiel Readiness Command
ATTN: DRSTS-RCER
4300 Goodfellow Boulevard
St. Louis, MO 63120

2. LOCAL REQUEST NUMBER (Optional)
RCE-9-83

3. POSITION TITLE OF VACANCY
Equal Employment Opportunity Specialist

4. SERIES
GS-160

5. GRADE
12

6. REFERRAL AND SELECTION (Item 6d to be completed by requesting activity; other items by issuing office)

a. CANDIDATE CATEGORY CODE

b. NAME OF CANDIDATE(S)	c. SERIES AND GRADE	d. ACTION TAKEN SYMBOL
BIGBY, Paul C.	GS-160-11	
JONES, Bernice M.	GS-160-11	

SHEFFIELD, James H.	GS-160-11	S-DDO*
GREEN, Rosetta, L.	SF-171	RNA

Less than three available candidates—request Supplemental List.

* Declined definite offer on 12/31/79 due to problems with his mother.

7. REFERRAL ACTIVITY AUTHENTICATION

a. NAME, TITLE, AND SIGNATURE OF ISSUING AUTHORITY

/s/ Nancy A. Flynn
for HELENE L. BRYANT, EEO Career Program Administrator

b. DATE LIST ISSUED
Aug 23, 79

c. LIST NUMBER
9049A A4

d. EXPIRATION DATE
Extended Per N Flynn
Jan 9, 79

8. SELECTION AUTHENTICATION

a. TYPE NAME AND TITLE OF SELECTING OFFICIAL
(Illegible)
EEO Officer

b. SIGNATURE OF SELECTING OFFICIAL
B. Bailey Howard
EEO Officer

c. DATE OF SELECTION
11/29/79

DEFENDANTS' EXHIBIT 10, 9, PAGE 11

DISPOSITION FORM

For use of this form, see AR 340-15, the proponent agency is TAGGEN.

REFERENCE OF OFFICE SYMBOL
DRSTS-H
SUBJECT
Career Referral Record
TO DRSTS-RCER FROM EEO Office
DATE SEP 27 1979 CMT 1

ATTN: Ms. G. Williams Ms. Howard/cc/3747

1. Reference DF, DRSTS-RCER, 14 Sep 79, subject as above.

2. Based on a review of the documentation available, I find that Mr. Sheffield's background is the only one suitable for this vacancy. IAW CPR 950-1, I believe at least 3 to 5 candidates should be available for any one vacancy.

3. Therefore, request a new listing for this position.

/s/ B. Bailey Howard
Equal Employment
Opportunity Officer

1 Incl as
DRSTS-RCER

TO DRSTS-H FROM C, R&P Br. DATE CMT 2
ATTN: B. Bailey Howard Ms. Williams/cv/2093

1. In accordance with referenced CPR 950-1, supplemental referral lists may be requested only if the selecting official has less than three available candidates from which to make a selection.

2. Since there are three available condidates, subject career referral list is returned for action.

1 Incl
nc

C. PATRICK GENTRY
Chief, Recruitment &
Placement Branch

DEFENDANTS' EXHIBIT 10, PAGE 10

DEPARTMENT OF THE ARMY

Hq. US Army Troop Support & Aviation
Materiel Readiness Command
4300 Goodfellow Boulevard, St. Louis, MO 63120

(SEAL)
DRSTS-RCER 31 OCT 1979

SUBJECT: Career Referral Listing #9049A A4 for Equal Employment Opportunity Specialist, GS-160-12

Commander
US Army Materiel Development and
Readiness Command

ATTN: DRCEE (Mr. George Jones)
5001 Eisenhower Avenue
Alexandria, VA 22333

1. Reference is made to telephone conversation between Mr. George Jones your headquarters, and Mr. C. Patrick Gentry, this office, 26 October 1979, subject as above.

2. Subject referral list is forwarded without selection action to your headquarters, per Mr. Jones' request. Should your review indicate selection action be taken by this command, it is requested that an extension on the expiration date of this list be obtained and that it be returned to this office. In the event you determine this list to be invalid, please return it to HQ DA with a request for a new list.

FOR THE COMMANDER:

1 Incl /s/ C. Patrick Gentry
for E. J. WRIGLEY
as Civilian Personnel Officer

DEFENDANTS' EXHIBIT 10, PAGE 9

DRCEE (31 Oct 79) 1st Ind

SUBJECT: Career Referral Listing #9049A A4 for Equal Employment Opportunity Specialist, GS-160-12

Headquarters US Army Materiel Development and Readiness Command,

5001 Eisenhower Avenue, Alexandria, VA 22333

26 November 1979

TO: Commander, US Army Troop Support and Aviation Materiel Readiness Command, ATTN: DRSTS-RCER, 4300 Goodfellow Blvd, St. Louis, MO 63120

1. The Department of the Army has advised that selection action must be taken on subject referral. Additional names cannot be added at this time.

2. The expiration date has been extended to 28 December 1979.

FOR THE COMMANDER:

/s/ George L. Jones
GEORGE L. JONES
Acting Chief
Office of Equal Opportunity

1 Incl
nc

CAREER REFERRAL LIST

For use of this form, see HQDA Letter 690-78-25

The proponent agency is Office, Deputy Chief of Staff for Personnel

PLEASE READ REQUESTING ACTIVITY
INSTRUCTIONS ON REVERSE- SIDE
BEFORE USING THIS FORM

1. REQUESTING ACTIVITY
(Name, mailing address, and ZIP Code)
US Army Troop Support & Aviation
Materiel Readiness Command

ATTN: DRSTS-RCER
4300 Goodfellow Boulevard
St. Louis, MO 63120

2. LOCAL REQUEST NUMBER (Optional)
RCE-9-83 S1

3. POSITION TITLE OF VACANCY
Equal Employment Opportunity Specialist
Suppl to 9049A

4. SERIES
GS-160

5. GRADE
12

6. REFERRAL AND SELECTION (Item 6d to be completed by requesting activity; other items by issuing office)

a. CANDIDATE CATEGORY CODE

b. NAME OF CANDIDATE(S)	c. SERIES AND GRADE	d. ACTION TAKEN SYMBOL
ORMS, Sexton G. Jr.	SF-171	ANS
BIGBY, Paul C.	GS-160-11	S
FULLER, Nona D.	GS-34611	ANS
JONES, Bernice M.	GS-16011	ANS

7. REFERRAL ACTIVITY AUTHENTICATION

a. NAME, TITLE, AND SIGNATURE OF ISSUING AUTHORITY

/s/ Nancy A. Flynn
for HELENE L. BRYANT,
EEO Career Program
Administrator

b. DATE LIST ISSUED
21 JAN 80

c. LIST NUMBER
0005A A4

d. EXPIRATION DATE
5 MAR 1980

8. SELECTION AUTHENTICATION

a. TYPED NAME AND TITLE OF SELECTING OFFICIAL

BOOKER T. McMANUS
Chief of Staff

b. SIGNATURE OF SELECTING OFFICIAL

/s/ Booker T. McManus

c. DATE OF SELECTION
21 MAR 80

JOINT EXHIBIT 6

DRSTS-H JUN 9, 1980

MEMORANDUM FOR CHIEF OF STAFF

SUBJECT: EEO Office Overtime Use—
DECISION MEMORANDUM

PURPOSE: To respond to the Chief of Staff Note #6-4.

DISCUSSION:

1. As I have previously reported to you on a number of occasions, overtime in the EEO Office has been required because of staffing limitations. One GS-12 has been on

special assignment since last Oct 79. A permanent P-T GS-09 was hired 23 Mar 80 to work on the Hispanic Employment Program only. Another GS-12 came on board on 5 May 80, during Federal Women's Program Week. Below is a count of weekly hours the EEO Officer should be able to expect to be devoted to Special Emphasis Programs and those available for total EEO Program management:

TOTAL WORK HOURS	GRADE	TITLE	SPECIAL EMPHASIS HOURS	EEO PROGRAM HOURS
40	GS-13	EE Officer	Included in Program	40
40	GS-12	EO Spec (BEPM)	20	20
40	GS-12	EO Spec (FWPM)	20	20
40	GS-11	EO Spec (Complaints)	0	40
40	GS-09	EO Spec (HEPM)	20	0
40	GS-08	EO Asst	10	30
40	GS-06	Secretary	10	30
40	GS-04	Clerk-Steno	10	30
40	GS-03	Clerk-Typist (Pool)	10	30
360			100	240

The following chart shows actual resources available since the detailed staff left last Jan:

40	GS-13	EE Officer		40
40	GS-06	Secretary	10	30
40	GS-04	Clerk-Steno	10	30
40	GS-03	Clerk-Typist (Pool)	10	30
160			30	130

2. The HEPM is required to spend all of her time on her program management by job description. Since starting, the FWPM has spent almost 100 percent of his time on his program management, as well as on his special CLF project for the Commander. As a result, this office is

minus 110 hours input for total EEO Program management. This equates to the input of 3 workers.

3. From Jan through Mar we processed 126 suspenses. We presently have 41 suspenses on hand, of which 15 are for backlogged complaint actions. From Jan through Mar the EEO Officer handled 277 phone contacts and 79 personal contacts for the Complaints Program alone.

4. From Mar through Apr, 8 employees worked overtime on the AAPP: they expended 661.5 hours on that effort. In addition, 209.5 overtime hours were spent on complaint processing.

5. An Overtime Request and Authorization form is properly prepared for all overtime. As can be seen from the hours reported in paragraph 4 above, the major product for the recent overtime was the AAPP.

6. During 1978, TSARCOM processed 40 precomplaints and 15 formal complaints; in '79 it was 71 precomplaints and 13 formal; this office is presently processing over 44 precomplaints and 8 formal. This means that we are working more precomplaints in the first 6 months of FY 80 than were processed during all of 1978. There were 3 EEO experts on the staff during most of FY 78, for the past six months the EEO Officer has been the lone professional in directing complaint processing.

7. As you recall, last Feb at the Commander's direction you made an effort to acquire 4 EEO counselors for a 30-day detail. You were successful in getting 2—one from the Corps of Engineers and another from DCASR. The DCASR counselor was able to stay less than 2 weeks because she was needed to prepare for an IG Inspection.

During the past year this office has had as a staffing resource, 12 detailed employees and 7 civilian personnel management interns to train and supervise. As our latest interns left in Apr, I advised you that we could no longer review referrals or supervisory EEO appraisals. (Referrals for Black males are still sent to Mr. Crouch.) Adequate review of referrals and supervisory appraisals averages 20 hours a week.

8. Both my secretary and I have a surplus of leave. She has 25 hours carried over from last year, and 152 to use or lose for FY 80. I have 42 hours carried over from FY 79 and 150 to use or lose for FY 80. In addition, I have been denied training which would contribute to my individual career development.

9. Even after all the new EEO staff is aboard, we shall still go through the normal team-building adjustment period. I must say that neither my secretary nor I desire to work this extensive overtime; nevertheless, we have done so only because of the necessity. There was an EEO Office backlog here when I came aboard in Dec 78—there had been 2 vacancies, one for over a year—and since the departure of the 3 EEO specialists last summer the backlog has of course continued. I have consistently hoped to have a full EEO Office staff so as to be able to effect some consistent office planning, rather than continue to work under the stress of crisis management.

RECOMMENDATIONS:

1. That the EEO Office 2 vacancies be placed on the Civilian Personnel Priority List.

2. That Mr. Crouch be officially assigned back to his Equal Opportunity Specialist (BEPM) position on the EEO Office staff.

/s/ B. Bailey Howard
B. BAILEY HOWARD
EQUAL EMPLOYMENT
OPPORTUNITY OFFICER

COORDINATION: None required.

☐ Approved ☐ Disapproved
☐ Other

B. BAILEY HOWARD
EEO Officer, GS-13
Typed by:
CLARENZA CLARK

PLAINTIFF'S EXHIBIT 37

OFFICE OF THE COMMANDING GENERAL

TO: EEO DATE: 10 Oct 78
S:

SUBJECT: Affirmative Action Plan

Taskings:

F On page 26, rather than refer to RIF, put "forced placement of excess" instead.

G Make mention of the fact that complaints are an indication that the system has failed.

H An analysis of awards should be incorporated into the plan.

I Make sure that the wording regarding the rating of EEO Counselors will have no negative connotations.

J Submit the completed plan for my review.

SUBJECT: Interface with D/PT&FD
Tasking:

K Work with PT&FD to get the meetings on a more structured basis.

RICHARD H. THOMPSON
Major General, USA
Commanding

---

20 November 1978

MEMORANDUM FOR: Commander

SUBJECT: FY 79 EEO Plan of Action

1. Reference is made to the attached guidance/tasking in your Note #10-85 regarding subject plan.

2. Accomplishment of taskings is as follows:

Taskings

A—Done, see Appendix II to Part D, page 108.

B—Done, see page 2.

C—No change, I believe present statement meets requirement.

D—USCSC required actions are addressed in the plan as follows:

(1) Establish appropriate data base which uniformly captures personnel actions, etc., see pages 38 and 105.

(2) Assure managers/supervisors are involved in the problem identification/resolution phase in the development of Directorate EEO Actions Plans, see pages 100 and 101.

(3) Re-examine focus of the FWP, see page 94.

(4) Establish a responsive Hispanic Employment Program, see page 89.

E—Done, see Special Emphasis Program, page 27.

F—Done, see page 25.

G—Done, see page 31.

H—Done, see page 36.

I—Done, see page 86.

J—Attached.

3. An advance copy of the plan was handcarried to Mr. Jerry Nance, USCSC Federal EEO Representative, on 17 Nov 78.

/s/ Isabelle H. Klopner
ISABELLE H. KLOPNER
Acting Equal Employment
Opportunity Officer

1 Incl
as

COORDINATION:

Chief, Civ Pers Div—E. J. Wrigley 11/20/78

☐ Approved ☐ Disapproved
☐ Other

---

1 December 1978

PURPOSE: To obtain the Commander's approval of tasking accomplishments and signature on EEO policy statements.

DISCUSSION:

1. Reference is made to the attached guidance/tasking in your Note #10-85 regarding subject plan.

2. Accomplishment of taskings is as follows:

Taskings

A—Done, see Appendix II to Part D, page 108.

B—Done, see page 2.

C—No change, I believe present statement meets requirement.

D—USCSC required actions are addressed in the plan as follows:

(1) Establish appropriate data base which uniformly captures personnel actions, etc., see pages 38 and 105.

(2) Assure managers/supervisors are involved in the problem identification/resolution phase in the development of Directorate EEO Actions Plans, see pages 100 and 101.

(3) Re-examiner focus of the FWP, see page 94.

(4) Establish a responsive Hispanic Employment Program, see page 89.

E—Done, see Special Emphasis Program, page 27.

F—Done, see page 25.

G—Done, see page 31.

H—Done, see page 36.

I—Done, see page 86.

J—Attached.

3. An advance copy of the plan was handcarried to Mr. Jerry Nance, USCSC Federal EEO Representative on 17 Nov 78.

RECOMMENDATION: That the Commander approve tasking accomplishments and sign EEO policy statements.

ISABELLE H. KLOPNER
Acting Equal Employment
Opportunity Officer

1 Incl
Tab A—FY 79 EEO Plan
of Action

COORDINATION:

E. J. Wrigley, 20 Nov 78

☐ Approved ☐ Disapproved
☐ Other

ISK 12/1
AEEOO
KLOPNER

MEMORANDUM FOR: Commander

SUBJECT: FY 79 TSARCOM EEO Plan of Action—
DECISION MEMORANDUM

PURPOSE: To obtain the commander's approval of tasking accomplishments and signature on EEO objectives.

DISCUSSION:

1. Reference is made to the attached guidance/tasking in your note #10-85 regarding subject plan. Starting with index at Tab AA, responses are arranged by tabs. Other tabs reflect additional items added as the result of IG Inspection, commander's R&A, and 1978 CSC Evaluation direction and recommendations. Putting the plan in the form of a TSARCOM Pamphlet, developing action items and retyping has delayed final preparation. Target dates have been adjusted for more feasible accomplishment. Part D format was revised to comply with FPM Letter 713-40. Regarding the commander's 18 Dec 78 R&A

(MFR, para 2d), data used by the CSC evaluation team was reflected in its report through assessment and action requirements which we have incorporated into Part D of this plan. The plan is presented for your review and fulfills your Task J requirement.

2. An additional extensive effort has been extended by the EEO staff to prepare and coordinate this plan. Of obvious concern is how TSARCOM is going to accomplish all actions within available resources. Action item 1.6.6.6. (Tab G, page 86) under objective 1.6.6: To develop systems so as to more effectively use available EEO resources, will give us the capability under this zero-based budgeting concept. This will enable us to better plan what we can and cannot do within a stated timeframe. Some unknowns are the proficiency under which our new HEPM will perform, the extent of our complaint activity, and the volume of internal and higher HQ correspondence.

3. A copy of this approved plan will be sent to the EEOC and DARCOM.

DRSTS-H

SUBJECT: FY 79 TSARCOM EEO Plan of Action—DECISION MEMORANDUM

RECOMMENDATION: That the commander approve tasking accomplishments and sign EEO policy statements.

/s/ B. Bailey Howard
Equal Employment Opportunity Officer

1 Incl
Tab A—MFR

COORDINATION:

C, CPD—Concur	E. J. Wrigley	DATE: 2/26/79
C, Force Dev—Concur	Illegible	DATE: 2/26/79
Pres, NFFE Local 405	Richard J. Kaiser	DATE: 2/27/79

☐ Approved ☐ Disapproved
☐ Other

Typed by
CLARENZA CLARK

NOTIFICATION OF APPLICATION ACTION

Office Symbol
DRSTS-RCER

Date
18 Nov 82

Position Applied For
Supply Cataloger
GS-2050-12

Personnel Staffing
Specialist, GS-212-11 & 12

Management Employee
Relations Specialist
GS-230-11 & 12

From:

HQ, US Army Troop Support & Aviation Material
Readiness Command
4300 Goodfellow Blvd.
St. Louis, Mo 63120

To:

Ms. B. Bailey Howard
7285 Country Club Road
St. Louis, Missouri 63121

Letter of Submission dtd 10/26/82.

For information regarding your application (Letter) dated 9/18/79, please read only the paragraphs below which are checked. ONLY those paragraphs opposite which there is a check mark in the block provided give information that applies to your application.

X Your application has been accepted for consideration for the position(s) stated above, you will be considered with other applicants when vacancies occur and when the area of consideration has been extended to include outside applicants.

Typed Name and Title

Sonia Snider, Staffing Clerk

Signature

/s/ Sonia L. Snider

APPENDIX C

TESTIMONY OF C. PATRICK GENTRY

* * *

(p. 3-45) Continuing—"COMPLAINTS EXAMINER: So I gather from your testimony that you didn't experience any problems with Ms. Howard out of the ordinary from the normal problems that you experienced with other managers?

"THE WITNESS: No. And that describes—that in essence relates that to the average time to fill that we have been experiencing for some time in the process of doing it per (p. 3-46) regulation, per the procedure, per the concerns of the Uniform Guidelines and Employee Selection Procedures."

Q Do you recall that testimony?

A Yes, I do.

Q That was true, wasn't it?

A Yes, it is.

* * *

TESTIMONY OF GEORGE JONES, Defense Witness

* * *

(p. 4-34) Q Let me ask you this: In your opinion, was she able, in your opinion, to meet the workload that was placed on her with the staff that she had?

A Well, the entire workload, I would say no, she wasn't.

Q How much of the workload was she able to do?

A I'd say that based on the staff that she had, properly managed, she should be able to do about 65%, 70% of the workload.

* * —*—

(p. 4-149) Q Oh, I see. That was in August.

And you said on direct examination that during her—that you believed in August that with the staff she had, she could do 65 to 75% of her work, of the EEO office's work?

A I don't know if I said that or not.

Q Well, 65 or 70% did come up on your direct examination. You said that with her staff she could do at least 65 to 70% (p. 14-150) of her work?

A Once she had a full staff on board, that's what I indicated, based on the workload she had.

* * *

(p. 4-150a) Q Let me ask you this, Mr. Jones? During 1979, the autumn of 1979 through the summer of 1980, knowing what—the size of TSARCOM at that time, know-

ing the increased number of pre-complaints, could one trained EEO Officer working as the only EEO professional in the office have accomplished the tasks, all the EEO tasks that were tasked statutorily by the Commander to that EEO office at TSARCOM?

A Not all of them.

Q It couldn't be done by one person without help, could it?

A Not basically, no.

Q In fact, even at that time there were four other EEO professional slots in that office, at least four, isn't that right?

A I don't know. If you say so.

Q And with a full complement, you thought she could do 65 to 70% of the work?

A At least.

* * *

(p. 4-155) Q (By Mr. Shapiro) How do you explain the increased staff that Mr. Redwine enjoyed as the EEO Officer in a no-bigger TSARCOM in 1981-'82?

A I don't know, you'd have to ask the Commander or the Chief of Staff, whoever gave him the staffing, and the basis on which they gave it to him.

* * *

(p. 4-159) Q Let me understand something, and maybe I missed it, but I had in my notes—I went back to check them—when I asked you the question about—that resulted in your answer 60 to 65%, the question I asked you, and

maybe you can clarify what you meant, I asked you, with the reduced staff that she had, how much of the workload that was assigned to her could she do?

I think Mr. Shapiro asked a question with her full staff how much of the workload could she accomplish.

Now, can you clarify for us what was the answer and which is correct? What was your answer with respect to which one is (p. 4-160) correct?

A Okay. Well, with the reduced staff that she had, based on the people that were in that office, June Griffin, Nona Fuller, et cetera, I indicated 65 to 70%, because based on my assessment of her workload at that time, the type of workload that she had, that she could accomplish that.

Subsequent to that, based on a normal functioning EEO office, people being in and out, on leave, et cetera, I looked at June Griffin and Nona Fuller as being almost the comparable to an EEO Specialist. And so that's why I said 65 to 70%. It possibly could be even higher once you get full-time specialists who are doing things repetitively.

* * *

(p. 4-122) Q Do you know who was processing and who was responsible for taking informal complaints that were becoming formal and sending them off to USACARA with respect to complaints at this time frame of black males at TSARCOM?

A Of black males?

Q Yes

A I believe Mr. Crouch was.

Q Yes. Ms. Howard wasn't responsible for that, Mr. Crouch was, is that your view?

A What I said was, is you asked if I understood who was handling the black male complaints.

Q Okay. We are not disputing; right.

A Mr. Crouch.

Q And Mr. Crouch was packaging them and sending them, as far as you know, over to USACARA?

A That I wasn't sure exactly how they were being processed.

Q Your assumption, in writing this letter, was that Ms. Howard, because she was the EEO Officer at this time was responsible for the delay in all three of these EEO complaints?

A Once they had been counseled informally and they had been (p. 4-123) filed and sent to be processed to USACARA, yes.

Q And that's what you were complaining about here?

A Yes, sir.

Q In your "Exclusive for" to Gen Thompson?

A Yes.

Q And also down in the fifth paragraph, are there blanks there for other complaints?

A Yes, there are.

Q And you'll see, if you look at this again, that the blanks are not there, there are actually names of people there, correct?

A Yes.

Q And you don't know which one of these people were being processed by Mr. Crouch, but you looked to Ms. Howard, you assumed in this letter that Ms Howard was responsible because she was the EEO Officer, is that right?

A That's correct.

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TESTIMONY OF GEORGE JONES

Defense Witness

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(p. 4-77) Q Okay. And the first phase, it was just—the whole idea of having a phase, Phase 1 and Phase 2, the whole plan was to be there at the end of May, isn't that right?

A That's correct.

Q Okay. Now, in fact, Ms. Howard's plan, the whole of it, that is to say the plan itself, what she had to produce, was (p. 4-78) in by the end of May, isn't that true?

A I don't know the exact date it was in. I believe it was in in May.

Q It wasn't late, the whole of the plan?

A The whole of the plan wasn't, no.

* * *

(p. 4-80) Q Then let me ask you the question this way: Isn't it true that the EEOC's suspense dates for the Affirmative Action Plans were not met by either the Department of the Army or DARCOM?

A I already said that, because the original dates were 1 October.

Q So you had to get extensions?

A Sure.

Q And the Department of the Army had to get extensions?

A Yes.

Q That was pretty common that year because of the change-over, wasn't it?

A I don't know if it was pretty common or not. I can only state what happened in Army and DARCOM.

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STATEMENT OF RELATED CASES

Pursuant to Rules of the United States Supreme Court, counsel knows of no cases that are related to this Petition which are now pending before this Court.

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Member of Bar
United States Supreme Court